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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK.

BY
SAMUEL JONES AND JAMES C. SPENCER,
REPORTERS OF THE COURT.

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JUDGES
OF THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK,
DURING THE TIME OF THIS VOLUME OF REPORTS.

JOHN SEDGWICK,

CHIEF JUSTICE.

HOOPER C. VAN VORST,

JOHN J. FREEDMAN,

CHARLES H. TRUAX,

HORACE RUSSELL,*

WILLIAM H. ARNOUX,†

RICHARD O'GORMAN,‡

GEORGE L. INGRAHAM.§

JUSTICES.

* Appointed to serve until January 1, 1883, in place of CHARLES F. SANFORD, deceased.

† Appointed to serve until January 1, 1883, in place of GILBERT M. SPEIR.

‡ Elected for full term of fourteen years, beginning January 1, 1883.

§ Elected for full term of fourteen years, beginning January 1, 1883.

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ERRATA.

In 1st line head-note, Newberg v. Schwab, page 232, "*claim*" should be "*client*."

In Platt v. Jones, page 284, 17th line from top, "*common*" should be "*converse*."

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CASES ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK
AT GENERAL TERM.

WILLIAM B. PARKER, APPELLANT, v. RICHARD C.
SPEER, RESPONDENT.

Execution against person—right of defendant's attorney to enforce payment of costs, in action in tort.

Under the authorities, where there is an agreement between the defendant and his attorney that the costs if recovered shall belong to the latter, the action being in tort and one in which defendant might have been arrested, said attorney may issue an execution against the body of plaintiff upon a judgment for costs on a dismissal of the complaint, though such judgment has been theretofore assigned by said defendant to plaintiff's attorney.

But the reason of the authorities upholding defendant's right to issue an execution against the body of plaintiff in such a case, questioned.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided December 30, 1882.

Appeal by plaintiff, from order denying motion to set aside execution issued against the person of plaintiff.

The action was in tort. The complaint was dismissed on the trial, and judgment for costs entered against plaintiff. The defendant's attorney had agreed with defendant,

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that the former was to receive the taxed costs, if the defendant recovered. The defendant, after execution against the property was returned unsatisfied, assigned to plaintiff's attorney the judgment for costs. Three days after, the defendant's attorney issued execution against the person of plaintiff. The plaintiff made a motion to set aside this execution. An order was made denying the motion. The appeal is from this order.

Charles Strauss, for appellant.

Jacob Fromme, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—The current of precedent and of opinion among lawyers, is in favor of the position that in actions in tort, under the conditions prescribed by the Code, when there is judgment for costs in favor of the defendant, the plaintiff may be taken by execution against his person. I of course accede to this and its consequences. If it were a new question, I should have come to a different conclusion.

The answer to the question rests solely upon the construction of the Code. In that is found the only authority to issue executions, and it gives all the contingencies upon which they may be issued.

In section 288 of the Code of Civil Procedure, it is declared, that "if the action be one in which the defendant might have been arrested," under preceding sections, "an execution against the person of the judgment debtor may be issued." In construing this it was said that in such an action, a plaintiff failing to recover might be the judgment debtor, and therefore he could be arrested.

In the next sentence, however, it is said, "but no execution shall issue against the person of a judgment debtor unless an order of arrest has been served as in this section provided, or unless the complaint contains a statement of facts showing one or more" causes of arrest. To my mind, the words "judgment debtor" here intend the defendant, on whom only an order of arrest can be served. Were the words in the first sentence intended to mean more than the words in the second sentence?

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The employment of the words in the first sentence seems to have arisen in this wise. The framer of the section began with a description of the action in which it was intended to provide for an execution against the person. It was an action in which, according to the previous section, an arrest might be made. At the beginning of the action there was no judgment debtor. Only a defendant as such could be arrested. When, however, an execution might be issued, the defendant had become a judgment debtor. He was so designated, instead of being called defendant, that it might be intimated that the execution was to issue against the defendant, only when judgment had been obtained against him.

Clearly the policy of the statute regarded more largely the cases of defendants against whom judgment had been obtained for fraud or other wrongs. The considerations that pertained to plaintiffs in unsuccessful actions in tort, were of a minor or subordinate kind, and too, of a kind that differed widely from those that regarded defendants. The idea would seem to be this: although a judgment for costs against a plaintiff, is in the nature of a contract debt, and imprisonment on account of contract debts has been abolished, yet if a plaintiff endeavors to obtain a judgment which will justify his issuing execution against the person and is unsuccessful, let him suffer what he attempted to inflict, whether he was free from malice or acted upon probable cause or not, unless he can pay the costs. This idea is embodied in the words "judgment debtor," which means partly defendant, and partly plaintiff. It seems to me, that the words should be confined to such judgment debtors as are defendants, on the principle of the maxim, "*ad ea quæ frequentius accidunt jura adaptantur.*" This maxim is applicable to statutes as well as to the unwritten law (*Broome's Maxims*, 42).

I think this view is made somewhat stronger by a construction of the present Code of Civil Procedure, which controlled rights to issue execution against the person, at the time of the present case. Section 1487 of that Code

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says, "an execution against the person of the judgment debtor may be issued in two cases. First, where the plaintiff's right to arrest the defendant depends upon the nature of the action. It may be assumed that these words justify the same position that was taken under the old Code, that the judgment debtor intended, might be the plaintiff. Still, I think that more doubtful under the language of the present Code. The second class is in any other case where an order of arrest has been granted and executed in the action, and if it was executed against the judgment debtor, where it has not been vacated. It would seem to me to be quite clear, that as the judgment debtor of this clause can only be a defendant, the same thing was meant by the judgment debtor of the introductory clause. It will be observed that the codifier did not think it worth while to make the discrimination that an order of arrest must be executed while the party is but a defendant, and before judgment is entered against him.

It has been unnecessary to state these personal opinions, for I believe the new Code did not intend to change the substance of the Code of Procedure on this point, and the authorities have construed the latter to authorize, in certain cases, the arrest of a plaintiff under execution. If such be the law, the conclusion seems to be inevitable that the plaintiff was lawfully arrested under the execution issued by the attorney who had a lien upon the judgment for the amount of costs recovered.

Order affirmed, with \$10 costs.

FREEDMAN, J., concurred.

Statement of the Case.

ADDISON MACULLAR, ET AL., APPELLANTS, v. JOHN W. McKINLEY, RESPONDENT.

False representations.—Statements to commercial agencies, effect of.—Evidence.

The courts will take judicial notice of the business and office of commercial agencies established for the purpose of furnishing information as to the credit and standing of business men.

To hold a defendant liable for an alleged false representation as to his financial standing made to such an agency, the evidence must show that he was the responsible cause of the plaintiff's relying on the statement, and ordinarily this will be shown by the fact of the making of the representation.

But such representation will hold against defendant only as to sales made within such time as, according to the custom of the agency, would elapse before another application is made to him, and another statement procured.

Accordingly, where defendant, in February, made statements to a commercial agency tending to show his financial responsibility at the time, but also showing that his credit was not strong, which facts upon application were communicated to plaintiffs, and on the faith of which they sold to defendant goods at divers times, all of which were paid for up to the ensuing June, when defendant, being again applied to by said agency, declined to make any statement, which fact was put upon the records of the agency, with other information tending to show that defendant's standing and credit were not good, the evidence showing that it was the custom of the agency to supply its information only upon application therefor.

Held, that as to sales made to defendant by plaintiffs after such second interview in behalf of the agency, plaintiffs were not induced by him to rely upon the statement of February by itself, but upon it and such further statement as would be made in the usual course of business; that from the two statements, it appeared that the defendant did not claim credit upon any implied assertion that his first statement held good. *Further held*, that the complaint was properly dismissed. RUSSELL, J., dissented.

Before SEDGWICK, Ch. J., FREEDMAN and RUSSELL, JJ.

Decided December 30, 1882.

Appeal from a judgment in favor of the defendant for costs, upon dismissal of the complaint at trial term.

The action was for damages for false representations

Statement of the Case.

alleged to have been made by the defendant in purchasing goods upon credit from the plaintiffs.

The defendant was a merchant tailor in the city of New York. The plaintiffs were merchants in Boston. The plaintiffs began to sell goods to the defendant in May, 1881, through their traveling agent. Before extending credit to the defendant they made inquiries as to the defendant's financial standing, of the Bradstreet Company, a mercantile agency to which the plaintiffs were subscribers, a part of whose business it is to furnish information to such of their subscribers as inquire. The report was as follows:

“McKinley, J. W., Tailor, New York City.

“John W., 127 Nassau street, states, ‘Have a stock on hand of \$2,500 and no liabilities, as I pay cash for all my purchases.’

“He has been in the above business for the past forty years, during which time said failed twice, the last time some three or four years ago, and effected a compromise at fifty cents; was formerly at 506 Broadway, afterwards at 264 Broadway, and moved to present location last May, which he is obliged to vacate next May, as the building is to be taken down.

“His wife is said to own property, the income of which supports the family. Parties who have known him many years speak of him as an honest, industrious man; though doing a small, close business, and not doing much, if anything, more than making a living for himself. Is not known to be asking any credit, as he became so very slow in his payments, that those who have sold him for years decline selling him except for cash.

“21 F. Feb. 25, 1881.

“Nov. 22, 1881. To Macullar, Parker & Co.: The correctness of this report is not guaranteed, but having been obtained by us in good faith—from authorities deemed reliable—it is transmitted to you in strict confidence for your exclusive use and benefit, and in accordance with the terms of the contract existing between us.

Respectfully, THE BRADSTREET COMPANY.”

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A witness in the employ of the Bradstreet Company testified that the statement "Have a stock on hand of \$2,500 and no liabilities, as I pay cash for all my purchases," was made to him by the defendant on or about February 25, 1881, and that, at the time, he informed the defendant that he came there as an employee of the Bradstreet Company for the purpose of getting a statement of his financial condition.

One of the plaintiffs testified that he sold the goods in question relying on the truthfulness of this statement which, upon his inquiry, was furnished him by the Bradstreet Company.

The defendant purchased several bills of goods in May and June from the plaintiffs, for which he paid. The sales and credits, on account of which this action was brought, were made in August, September and October. In November, the defendant made a general assignment, preferring certain members of his own family, among others his wife, to whom he recited an indebtedness of nearly \$1,800, all borrowed before September, 1880, and \$350 borrowed from other persons before February, 1881. His inventory showed an indebtedness of \$4,097.63, with assets of the nominal value of \$2,526.80, and actual value of \$1,553.80.

The defendant did not deny that he made the statement in February attributed to him, but said he did not recollect it. It was proved on behalf of the defendant, that on or about June 20, another reporter of the Bradstreets called upon the defendant to get a report of his financial condition for the use of the Bradstreet Company. The reporter's testimony was as follows: "I asked him if he felt inclined to give me some figures regarding his condition, as we had some inquiry at the time, and I desired to represent him properly; we had quite a long conversation; I can't remember the exact words in the matter, but he did not feel inclined to give any statement; he seemed to be under the impression the agencies had

Statement of the Case.

done him harm ; did not think well of them ; that they did not represent him properly, and a statement would not do him any good ; a statement would not do him any good if made ; he seemed to think he was all right."

Q. "Can you refresh your recollection from any data in your possession, or by the report you made to the company about that?"

A. "Yes, sir ; I have a memorandum in my pocket ; it was: 'J. W. McKinley, tailor, New York City, 418 Sixth avenue, formerly 127 Nassau street, near John ; for several years he was located at Broadway and Prince streets, then 264 Broadway, and one year, 127 Nassau ; moved to present location last May ; he declines giving any information ; he is believed to be working with his wife's money ; is stated to have failed two or three times ; regarded as of little responsibility, and jobbing houses in the city say they would sell him only for cash.' That report was spread upon the books of the Bradstreet Company June 20, 1881 ; it was put on file and distributed to those who inquired."

Q. "Did you, after that date, call upon Mr. McKinley and have other conversation about a report?"

A. "Yes sir ; after his failure."

The court below dismissed the complaint, on the ground that "Bradstreet & Company were, for the purposes of the trial, the plaintiffs' agents. The information which they communicated to the plaintiffs required the plaintiffs subsequently to ascertain whether they had received further information which qualified the former representations." The latter information, spread upon the books of Bradstreet & Company on June 20, before any of these bills were contracted, was that the defendant was doing business with his wife's money, and was of little or no responsibility. The plaintiffs were bound to ascertain whether there had been any change in the report to the agency or otherwise. In law, the plaintiffs are chargeable with the knowledge of that further report made to their agents. The complaint must be dismissed."

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C. C. & S. F. Prentiss, for appellants.

R. W. Todd, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—The alleged false representations were not made by the defendant directly to the plaintiff, but were made through the Bradstreet Mercantile Agency, as a channel of communication. *Eaton C. & B. Co. v. Avery* (83 N. Y. 31), says of the responsibility of a defendant in such a case: “A person furnishing information to such an agency in relation to his own circumstances, means and pecuniary responsibility, can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party.” “But the defendant knew that they were a mercantile agency, whose business it was to give information as to the standing and means of dealers, and that it was resorted to by merchants to obtain such information. By making a statement of the financial condition of his firm to such an agency, he virtually instructed it what to say if inquired of.” To make a defendant liable (p. 33), the testimony should show that the statements “were made with the intent that they should be communicated to and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with intent to procure credit and defraud such persons thereby, and such statements were communicated to the plaintiff and relied upon by it, and the alleged sale was procured thereby.” I wish here specifically to notice that in this declaration of what the law is, it is implied that the evidence must show that the defendant was the responsible cause of the plaintiff’s relying on the statement. Of course this would be shown, in most cases, by the mere fact of the making of the representations when the defendant was proceeding to buy the goods. There might, however, be cases in which the representations were made to induce one sale only, and yet the seller would be induced by the statements to make another sale, at a future time, when

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the buyer would not be responsible for the operation of the seller's mind.

As the responsibility of the defendant in such cases depends upon the character of the agency as a usual means of communication, it is shaped and limited by the peculiarities of the methods of business of the agency. And on the other hand, the plaintiff in relying upon the communications from the agency, must himself take into account both those peculiarities and the fact that the defendant made the statement in view of them.

In the present case, there was some testimony as to the methods of business of the agency, and agencies of this kind are so well known that the courts can take judicial notice of their business and office (*Eaton v. Avery, supra*, 31). By the testimony, the agency carried on the usual business of a mercantile agency—to report to business firms the credit and standing of business men. The plaintiffs were subscribers to the agency. It was not shown how often, as a habit, the agency applied to business men for information as to their means. As a fact in this case, the agency applied to the defendant for a statement of his financial condition in February, 1881, and again in June, 1881. Both statements were spread upon the books of the agency. What was done in this case, it may be assumed was done in general as to all business men. Indeed, the methods of business require that applications be made from season to season repeatedly. The profit or loss of each business season must cause a change of the financial condition at the beginning of the season, or the fact, that nothing has been made or nothing lost, is an important piece of information.

A just conclusion in my judgment is, that when the plaintiffs received the statement of February, they could not be justified in assuming that it was made by the defendant, as something which he meant they should sell goods upon for all future time, but only for that space of time that, according to the custom of the agency, would elapse, before another application be made, and another statement pro-

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cured. The defendant could assume that after the application in June, the plaintiffs would act upon the custom of the agency, and giving no further operation to the first statement than it should properly have, would not act upon it, except in connection with the June statement. The defendant would be bound to know that the statement he made in February would be communicated to the plaintiffs, and would also have the right to believe that they would learn of the statement in June.

It was observed in the course of the argument at the bar, that the agency did not furnish the information it received to its subscribers always and uniformly, but gave it only to such of them as inquired for information. Nevertheless, it is true, that the defendant would be liable for the February statement, on the ground that when he proposed to buy goods he would have convincing reason to believe that the plaintiffs, if subscribers to the agency, would apply to it. He must have the benefit of the consideration that his mind would work in a like manner upon proposing to buy goods after the second statement.

A more particular view of the facts will corroborate, I believe, these propositions. In February, 1881, the defendant said to the agency, "I have a stock on hand of \$2,500, and no liabilities, as I pay cash for all my purchases." In its report to the plaintiffs, the agency added that the defendant had been in business for forty years, had twice failed—the last time three or four years before, and effected a compromise at fifty per cent.; that his wife is said to own property, the income of which supports the family; that parties who have known him, speak of him as honest and industrious, doing a small, close business, and not doing much more than making a living for himself; that he is not known to be asking any credit, as he became so slow in his payments, that those who have sold him for years decline selling him except for cash.

In May, 1881, the plaintiffs' salesman sold the defendant certain goods. The testimony for plaintiffs is, that before selling, they obtained from the agency a report that con-

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tained the matter that has been given. On the trial, the witness who swore to this produced a report of the agency as the one he acted on in May. This, however, was dated in November. Probably, the witness meant to say that the report dated November, was a duplicate of the report he received in May. If it be otherwise, the plaintiffs' case failed, for the goods in action were all sold before November. At any rate, the goods sold from May 11, to June 21, on five occasions, in amounts from \$112 to \$26, were all paid for. The aggregate was \$286.

In August, 1881, the plaintiff sold the defendant, and in September and October four parcels, in amounts from \$557 to \$62, amounting in all to \$950.

Before August and in June, the agency had applied to the defendant and he had made a declaration which was, as has already been said, placed upon the books of the agency. It was as follows: "He declines giving any information; he is believed to be working with his wife's money; is stated to have failed two or three times; regarded as of little responsibility, and jobbing houses in the city say they would sell him only for cash."

It is extremely doubtful whether the testimony shows that the plaintiffs did not learn of this statement, as I call it, of June, and indeed, this would have demanded attention, if in the disposition of the case on the trial, counsel had not assumed that the plaintiffs had not learned of it.

In connection with the reflections that come from the general nature of the business of the agency, as calling for repeated application to persons likely to ask credit, an illustration of the reason and probability of it is found in the February statement. It is manifest from this, that the defendant had a very debilitated credit. A breath of disaster would destroy it. A few men not paying their bills, would make him insolvent, for he was a tailor doing a small, close business. The plaintiffs must have known that the agency would make an additional investigation after February and before August 16. The defendant must have

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thought that the facts obtained in June would be learned by the plaintiffs before they would sell to him in August.

I therefore, am of the opinion that it appeared by the undisputed testimony, that the plaintiffs were not induced by the defendant to rely upon the statement of February by itself, but upon it in connection with such further statement, as in the usual course of the business would be made before August. The plaintiffs would learn from the two coupled together, that the defendant refused to reassert the facts stated by him in February, and therefore did not claim any credit upon an implied assertion by him, that his first statement still held good. The defendant had reason to believe that the plaintiffs had learned of the second statement, and were not about to rely upon the first statement. On either proposition, the defendant was not liable, and the court made a correct disposition of the case.

In my opinion, the judgment should be affirmed, with costs.

FREEDMAN, J., concurred.

HORACE RUSSELL, J.—Dissenting.—[After stating the facts as above.]—The question presented to us is raised by the plaintiffs' objection to the admission of the testimony in regard to the second statement in the books of Bradstreet & Company, entered on June 20, and by their exception to the dismissal of the complaint on the strength of that entry.

It was settled in *Eaton, Cole & Burnham Co. v. Avery* (83 N. Y. 31), if indeed there remained any doubt on the subject before that case was determined, that false statements as to financial condition made to a commercial agency, with the intent that they should be communicated to persons seeking to ascertain financial responsibility, and with intent to procure credit, and defraud, constitute a sufficient foundation for an action of deceit by persons defrauded by such means. The proof in the case before us,

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sufficiently established the making of representations, their falsity, the defendant's knowledge of their falsity, and that the plaintiffs relied upon them, to demand the submission of the case to the jury, unless the judge below was right in taking the case from them, because of the effect to be given to the statement of June 20. The rightfulness of the decision below depends upon the answer to two questions: (1) Were the plaintiffs chargeable in law with the information received by the Bradstreet Company? and (2) Was the statement entered in the books of the Bradstreet Company on June 20, such a one as, so far as the defendant was concerned, retracted the statement of February 25, so that the plaintiffs were no longer entitled to rely and act upon the faith of that statement?

It is not open to question, that a principal is chargeable in law with information communicated to his general agent or to his special agent in the course of negotiations relating to a particular business. This rule of law has been adopted, because in such transactions, the agent takes the place of the principal, and in all things substantially acts and decides as the principal might if he were personally present, is, in short, his *alter ego*.

Had the defendant communicated to the plaintiffs directly, a recall of the statement of February 25, he certainly could not be held in this action. Had he communicated it to that person, whether one of the plaintiffs or their business manager, who is known as the "credit man" of commercial houses, he could not be held. So, had he communicated a retraction of the statement to the traveling salesman, who apparently conducted the transaction, the plaintiffs would be chargeable with knowledge of such retraction, and could not recover in this action. But I cannot understand on what theory Bradstreet & Company can be regarded either as the general agents of the plaintiffs, or as their special agents with reference to the business transactions between the plaintiffs and their customers, so that information communicated to them can

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be held, in law, to have been communicated to the plaintiffs themselves. True, Bradstreet & Co. were, in a certain sense, the agents of the plaintiffs; but, so far as this error book discloses and our general knowledge on the subject goes, the extent of their agency was that they agreed to furnish, upon *inquiry*, such information as they had in regard to the financial condition of persons in relation to whom their subscribers might desire to inquire.

In the cases of this character in the books, the commercial agencies are held to have been the agents of the purchaser so far as the communication of the information derived by him was concerned. Except that the plaintiffs paid, it is presumed, for their information, there seems to be no better reason for holding the Bradstreets the agent of one party than of the other; in which case, before the plaintiffs' action could be defeated, actual knowledge must be brought home to them.

The cases cited by the counsel, on the argument, in support of the theory on which this case was disposed of below (*Holden v. N. Y. & Erie Bank*, 72 *N. Y.* 286; *Bennett v. Buchan*, 76 *Id.* 386; *Whitney v. Groot*, 24 *Wend.* 82; *Rogers v. Warner*, 8 *Johns.* 92), fall far short of sustaining that theory.

In *Holden v. N. Y. & Erie Bank*, it was held that the bank was chargeable with the knowledge possessed by its president and chief financial officer in regard to a transaction conducted by him as such president.

In *Bennett v. Buchan*, it was held that the principal was chargeable with the knowledge of the agent who "negotiated the whole business."

It would certainly be an extension of the doctrine of those cases to impute to a principal, information which persons whom they sometimes consulted, had acquired.

Whitney v. Groot, and *Rogers v. Warner*, were actions against sureties, in which the agreement of the surety was construed to relate only to the first sale to be made to the persons whose purchases they guaranteed.

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Mercantile agencies are actual, not constructive agents ; that is, they act within actual, not constructive limitations ; and as persons can be held liable for statements made to them, only by showing that such statements were communicated to other persons as a basis for credit, so, in my judgment, can they only be relieved by showing that subsequent statements modifying the first, were actually communicated to the same persons. That they made subsequent and different statements, is, of course, admissible in evidence on the question of intent, but that is a different question from the one I am considering.

But even if it should be held that information of a retraction of a former statement made to the commercial agency, should, as a matter of law, be imputed to a subscriber to the agency, the mere declination in June to make a new statement after having made one in February, cannot properly be regarded as a retraction of the statement made in February. It might perhaps, excite some uneasiness on the part of a creditor, that a debtor should be unwilling to reiterate a statement made five months previously, but the creditor might very well attribute that unwillingness to the natural disposition of mankind, to resent frequent and impertinent inquiry. At any rate, such mere refusal was not of such a character as forbade his continuing to rely upon a positive and definite statement made a few months previous. The rumors referred to in the second statement, were merely given as rumors by the Mercantile Agency. They related to matters peculiarly within the knowledge of the defendant, and were covered by the statement made by him in February. If those rumors had been actually communicated to the plaintiffs they would have had a right to say "these are rumors which may or may not have foundation ; we have the positive statement of our customer given in February that he was entirely solvent, and owed no debts ; these rumors relate, not to any changed condition of affairs, but to his condition at the time we extended him credit as well as now ; we have still a right to rely upon his

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statement to us, and we will do so." Nor would it indicate a lack of business prudence on their part to do so.

The question for us is not how a jury will regard these transactions, but whether the court ought to have taken them from the jury altogether.

I am of the opinion that it ought not to have done so, and that, for that reason, judgment should be reversed and a new trial ordered, costs to abide the event.

SAMUEL P. KNAPP, APPELLANT, v. ULRICH SIMON,
IMPLEADED WITH SIMON DONAU AND CHRISTIAN A.
STEEN, RESPONDENT.

I. *Agreement.*

1. **EXTRINSIC EVIDENCE, TO APPLY TERMS OF.**

When parties use a term which in itself, conveys no meaning, its meaning as used by them is to be determined by a reference to that which both had in mind when they used the term ; and to this end the transactions leading up to the agreement, the positions thereafter taken by them, and their situation at the time, are to be considered.

1. "COBB CLAIMS."—Thus where by an agreement between plaintiff and defendants, the defendants agreed to protect the plaintiff against the "Cobb claim," the fact that one Cobb had brought an action against defendants for merchandise by him sold to them through the plaintiff, and during the pendency of this action another action was pending, brought by plaintiff against defendants for merchandise sold and delivered by him to defendants, including therein the Cobb merchandise, upon the settlement of which latter action the agreement in question was made, and also the fact that neither Cobb nor plaintiff had asserted that the latter had bought the Cobb merchandise as broker without disclosing his principal, may be considered in determining what was referred to by the phrase "Cobb claim."

EFFECT OF THESE FACTS.—Their effect, nothing to the contrary appearing, is to show conclusively that the claim referred to was such claim as Cobb might have against the plaintiff for goods sold and delivered to him absolutely, and not a claim for goods sold to him as broker without disclosure of the principal.

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II. Judgment—Privies to—Res adjudicata—Evidence.

1. WHERE ONE PURCHASES merchandise of another, and HIS VENDOR SUES him for goods sold and delivered, to which action he sets up as a defense that he purchased as broker of a third party, disclosing his principal at the time, and judgment goes against him, the THIRD PARTY having no notice of this action, IS NOT PRIVY to it, and the judgment does not establish as *res adjudicata*, or tend to establish as evidence, either that the purchase was made for him, or that the vendee disclosed or did not disclose him as the principal.

III. Reversal of judgment against plaintiff; when not.

1. CAUSE OF ACTION NOT CONTAINED IN THE COMPLAINT.

1. When such judgment will not be reversed, on the ground that said cause of action has been conclusively made, or that the evidence was sufficient to carry the cause to the jury for its determination on that cause of action.

(a) It will not be, where the evidence tending to support such cause of action, was received without objection, but was competent on the issues joined, and plaintiff's counsel did not request the trial justice to charge the jury as to the obligations of the defendant under such cause of action.

IV. Submission to jury.

1. Issue whether certain goods were bought by plaintiff as broker for defendants, or on his own account and by him sold to defendants.

(a) Under evidence that S. & Co. employed K., the plaintiff, to purchase certain wheat for them as their broker; that plaintiff did purchase the wheat and directed Cobb, the vendor, to deliver it to S. & Co., and it was so delivered; that Cobb sued the defendants for the value of the wheat, as goods sold and delivered by him to them through K.; that pending this action K. also sued S. & Co., for the value of wheat, sold and delivered by him to them (including therein the Cobb wheat) and for brokerage; that the latter suit was settled, one of the terms of settlement being that S. & Co. were to protect plaintiff against the Cobb claim; that afterwards S., one of the firm of S. & Co., settled the claim held against S. & Co. by Cobb by paying his portion thereof, and took a release under the act entitled an act for the relief of partners and joint debtors, passed April 18, 1838, which release recited: "Whereas the late copartnership of S. & Co., has been dissolved and is indebted to Carlos Cobb in the sum of ———, and interest;" that subsequently Cobb sued K. for the value of the same wheat as and for goods sold and delivered, giving credit for the amount paid by said S., to which action K. put in it a defense that he bought as broker for S. & Co. and disclosed them as his principals; in which action judgment went for Cobb, against K., of which action, however, S. &

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Co. had no notice; and that K. paid its judgment recovered against him by Cobb ;

HELD

the determination of the above issue was properly submitted to the jury in an action subsequently brought by K. against S. & Co., to recover the amount paid by him, K., to Cobb for this wheat, under the charge, "If in this transaction the plaintiff acted as principal and made a sale of this wheat to defendants, he cannot recover in this action ; if on the other hand he simply acted as broker then you have a further question to consider and that is in respect to this release."

V. *Knapp v. Simon*, 86 N. Y. 315, *distinguished*.

It seems the case there showed, either conclusively or as matter for the jury, that the Cobb claim, intended by the agreement made on the settlement of the former action of *Knapp v. Simon*, was a claim against Knapp, based on the fact that he had bought of Cobb as purchaser, while in fact he was broker for S. & Co. The present case shows that no such thing was proved at the last trial or assumed to be the fact at the time of the agreement.

Before SEDGWICK, Ch. J., FREEDMAN and RUSSELL, JJ.

Decided December 30, 1882.

The litigation arises out of a transaction which took place about October 23, 1868, between the plaintiff and one Cobb, resulting in the sale by Cobb of certain wheat.

The complaint alleges that the plaintiff bought the said wheat from said Cobb for the defendants, at their request, as their broker, that the wheat was delivered to defendant, that the total of the purchase money with charges for measuring and towage, and interest thereon on October 28, 1869, amounted to \$5,425.40, upon which day defendants paid said Cobb the sum of \$1,688.32, leaving due and unpaid the sum of \$3,737.04, which the defendants have never paid.

The complaint further set forth that said Cobb sued the plaintiff for the price or value of said wheat, and towage remaining so unpaid, and recovered a judgment for the sum of \$5,554.30 ; that said Cobb also recovered a further judgment for costs, on appeal from said judgment, amounting

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to \$106.51, and a further judgment for costs for \$145.34, in the same action.

It then set forth the payment by him (Knapp), on January 15, 1878, of said second judgment and the interest thereon, amounting to \$6,498.36, and that no part thereof had been repaid to him. It then averred that said judgments were recovered against him "although the defendants were the principals in said transaction, and he was a mere broker and surety, under allegations and proof that he failed to disclose the defendants as his principals, all of which were at the defendants' request, and for their use." The complaint prayed judgment for \$6,498.36, with interest from January 15, 1878.

Only the defendant, Ulrich Simon, answered.

By his answer he denied all the above allegations; and alleged affirmatively that all the grain and merchandise which were purchased by defendants from plaintiff were so purchased from him as principal, and not as agent for Carlos Cobb or any other person; and also set up (among others), as affirmative defenses the statute of limitations and a release to him from Cobb of, and from all claims and demands arising out of the transactions in the complaint set forth.

On the trial the plaintiff testified: "I have been a grain broker since 1863. I know the firm of C. A. Steen & Co. Its members were C. A. Steen, Simon Donau, and Ulrich Simon. Mr. Donau came to my office, and stated to me that they wished me to buy them a small quantity of wheat—say two thousand five hundred or three thousand bushels—and have it delivered to that distillery as soon as I could; I did so that day; I bought three thousand and twenty-six bushels and eleven pounds of Mr. Carlos Cobb, and it was delivered by Mr. Cobb; I ordered it of Mr. Cobb for this firm, I think, on October 23, 1868; I was to pay, I think, \$1.62 a bushel; I had bought other grain for them about that time, aggregating, including this, somewhere in the neighborhood of \$40,000 worth."

Two witnesses gave evidence in corroboration of this.

Defendant Simon was asked, "You knew Mr. Knapp

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bought this grain as a broker for your firm?" and answered, "I can hardly tell how he bought it—he charged brokerage. Yes sir." It appeared on the trial that the wheat was delivered to defendant; that about November 5, 1868, Cobb brought an action against these defendants for \$5,064.95, the value of said wheat, with certain charges, alleging a sale and delivery thereof to them through the plaintiff; that this action was settled as to defendant Simon, October 30, 1869, by his paying his part of the whole claim, and a release was given him under the act, entitled an act for the relief of partners and joint debtors, passed April 18, 1838, which release contained the recital, "Whereas the late copartnership of C. A. Steen & Co. has been dissolved, and is indebted to Carlos Cobb in the sum of \$5,064.95 and interest."

The evidence as to whether plaintiff consented to the giving of the release is contradictory.

It further appeared that during the pendency of this Cobb action, another action was pending, brought by this plaintiff against the defendants to recover the value of certain lots of wheat, including therein the said lot sold by Cobb, alleging a sale and delivery thereof by him to these defendants.

The pleadings in this action were not in evidence. Its value was derived from the oral testimony. Plaintiff testified as to it, "I could not get the money; they refused to pay. I called on them for the money, then I could not get the money, and I sued them."

Defendant Simon testified, "he sued me for \$39,000. There was \$37,000 and odd for grain, and \$1,000 and odd for commission."

This action was settled about April 8, 1869. The terms of the settlement as testified to by plaintiff, are best given in his language. He testified:

"Mr. Ulrich Simon called me out of the court-room; he said he wished to make a settlement, that he did not wish to have the matter go further, and wanted to know what arrangement he could make with me; I said they could

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settle if they wished to pay and make a very easy arrangement; he said they could not do that, but that he and Mr. Donau would pay me fifty cents on the dollar of my claim; I said, "Will you then take charge of the Cobb claim—bar that from me? Mr. Ulrich Simon said, "You never shall hear of that again; that we will settle ourselves; you need never give yourself any uneasiness in regard to the Cobb matter, that we will settle;" then we agreed upon a basis of settlement, paying me fifty cents on the dollar, excluding the Cobb claim, which was deducted from the original amount, which was not settled then.

One witness gave evidence in corroboration of this.

Defendant Simon testified: "At the time I settled with Knapp, he gave me distinctly to understand I had to settle the one with Cobb also." On his cross, the following questions were put and answers given. Q. "You agreed to settle it? A. I agreed to settle my portion. Q. And you say Mr. Knapp said you have got to settle that for yourself? A. Yes, my portion. Q. Did he use the words 'your portion?' A. Yes."

Defendant Simon did settle with Cobb for his portion, as above stated.

It further appeared, that in October, 1873, Cobb commenced an action against the plaintiff, alleging a sale and delivery of the wheat in question, by him to the plaintiff; that this plaintiff, for defense to that action, set up that he bought the wheat, as broker, for C. S. Steen & Co., and at the time disclosed his principals. In that action, Cobb recovered a judgment against this plaintiff for \$5,554.30, being for costs of the action, and the price of the wheat and towage with interest, after crediting the amount as to which Steen had been released.

Plaintiff paid this judgment, January 16, 1878. Defendants had no notice of this action.

The judge charged the jury: "If in the transaction the plaintiff acted as principal, and made a sale of the wheat to defendant, he cannot recover in this action, because his claim is outlawed." (To this plaintiff's counsel excepted.)

Appellant's Points.

If, on the other hand, he simply acted as broker in the transaction, then you have a further question to consider, and that is in respect to this release. Notwithstanding the release, if it was given by Cobb to the defendant, without the knowledge of the plaintiff, then plaintiff, having paid the money, can recover. On the other hand, if the plaintiff were present, or acquiesced in the agreement by which Simon was released, then the defendant is not liable."

The jury rendered a verdict for defendant. A motion for a new trial was denied. From the judgment entered on the verdict, and the order denying the motion for a new trial, plaintiff appealed to the general term.

D. M. Porter, attorney, and of counsel for appellant, on the questions considered in the opinion urged:—(1.) Under the agreement whereby defendant undertook to protect plaintiff against the Cobb claim, the relation of the parties, whatever they may have been originally, became, as between them, that of principal and surety; the defendants becoming principal debtors to Cobb and the plaintiff surety for the defendant; the surety cannot recover of the principal until he has paid the debt. Therefore plaintiff's cause of action under the agreement did not accrue until he paid the debt, which was not until January, 1878, and consequently this action having been commenced April, 1878, it was not barred by the statutes of limitations. Citing numerous authorities. (2.) Notice by plaintiff to Simon of the pendency of the Cobb suit was unnecessary (citing many authorities). (3.) This charge of the court, to wit: "If, in the transaction, the plaintiff acted as principal and made a sale of the wheat to the defendants, the plaintiff cannot recover in the present action," is erroneous. (a.) Because there is no evidence that he acted as principal, but the evidence is uncontradicted that he acted as broker. The complaint in the suit of Cobb v. Steen shows that Knapp was simply broker, and that suit was pending at the time of the settlement. Simon does not testify that Knapp sold as principal; the evidence is uncontradicted that Knapp bought as broker. Reed so

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testifies and also Knapp. Simon testifies: "As I stated he (Knapp) sued us for \$39,000; there was \$37,000 and odd for grain and \$1,100 and odd for commission." (b.) Because under the agreement plaintiff was surety for the defendants, and as such having paid defendants' debt is entitled to recover against them.

Vanderpoel, Green & Cuming, attorneys, *A. J. Vanderpool* and *H. N. Bookstaver*, of counsel, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—The complaint alleged that, in October, 1868, the defendants requested the plaintiff to purchase, as broker, for them certain wheat of Carlos Cobb, and that the plaintiff, as such broker, did buy for the defendants the wheat for \$5,064; that in October, 1868, the defendants paid said Carlos Cobb \$1,688, leaving the sum of \$3,737 due, which the defendants never paid; that thereafter said Carlos Cobb sued the plaintiff for the price and value of the wheat remaining unpaid and recovered judgment against him for the amount claimed; "that the said Cobb recovered the said judgments against this plaintiff, although the defendants herein were the principals in said transaction and the plaintiff was a mere broker and surety, under allegations and proof that the plaintiff failed to disclose the defendants as his principals, all of which was at the defendants' request and for their use." The testimony established the facts about to be stated. In agreement with the allegations of the complaint, the plaintiff as a witness swore that the defendants' firm requested him to buy the grain for them, and that on October 23, 1868, he ordered it of Mr. Cobb for the firm. The complaint, it has been seen, specifically states that he bought as a broker. The plaintiff gave no evidence to show that at any time down to January, 1878, he took the position, that he bought of Cobb apparently for himself but actually for defendants' firm as their broker, not disclosing the agency. For in addition to what has already been noticed, his answer in the action of Cobb against him alleged that the wheat was purchased of Cobb by him only as a broker for the present

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defendants' firm, and that Cobb knew that the wheat was purchased only by him as a broker and for the benefit of that firm. The plaintiff verified this answer after October, 1873, five years after the wheat was bought.

Soon after the wheat was bought in October, 1868, the plaintiff took a position at variance with that shown by the complaint and the proof. He brought an action against the defendants' firm for the value or price of the wheat, as goods sold and delivered by him to them. If this were well founded, the fact asserted by the plaintiff must have been that he bought for himself of Cobb, and sold to the defendants' firm.

In this action last referred to, the plaintiff claimed to recover for other wheat sold by him to the defendant's firm, which, with the Cobb wheat, amounted in value to about \$40,000. The learned counsel for appellant has argued that this form of complaint as to the Cobb wheat was, "in other words alleging, in effect, that he had not disclosed the names of the buyers and sellers, and therefore brought suit as principal." This seemed to me conclusively negatived, by the train of considerations that has been adduced, ending in his sworn answer of October, 1873, that Cobb knew that he acted as broker for the defendants' firm.

I wish now to notice, the effect of the action of Cobb against this plaintiff, upon the relation of the defendant to the transaction. It has been noticed that down to the time of the beginning of that action, plaintiff did not claim that he bought of Cobb as broker in fact, but not so informing Cobb. There is no testimony tending to show that the defendant or his firm, were informed or had any reason to believe, that the plaintiff had bought in that manner, or that Cobb claimed that he had. There is no proof that the defendant knew of the action by Cobb, its nature, its progress, or its result. He swears he did not, until after the judgment was paid by the plaintiff 1878. In the case it is admitted that he had no notice of the action, or the complaint of Cobb against the plaintiff simply charged him as purchaser. The answer alleged that the present plaintiff

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bought as broker of the present defendants' firm, and that Cobb so knew at the time.

The present complaint avers that Cobb recovered judgment in this action "under allegations and proof that the plaintiff failed to disclose the defendants or his principals." This averment was not proved. Cobb recovered from the plaintiff, on the purchase by him, he failing to prove that he bought as alleged in his answer.

While the action of this plaintiff against defendants' firm was pending, another action, that of Cobb against defendants' firm was pending, and this the plaintiff knew. Cobb alleged in his complaint, that he sold and delivered to the defendants' firm, through the present plaintiff as broker, the wheat in question. The complaint did not, and it was not necessary to allege, whether at the time of the sale, the present plaintiff announced his agency for defendants' firm.

The case does not show what was the answer of the defendants' firm to this complaint, nor does it show what was the answer of defendants' firm in the action of the present plaintiff against them. Although it may now be taken that there was an issue of fact in each action, its nature is not disclosed.

While these two actions were pending, contemporaneously and before April, 1869, negotiations began between the plaintiff and the defendants, for the settlement of claims in the action by the plaintiff against the defendants' firm. There was an agreement finally made, as plaintiff testified, on which he relies in whole or in part to support this action. The agreement, according to plaintiff's testimony, was that defendant's firm should, pay in a specified way, 50 per cent. of the claim for goods sold and delivered excepting for the wheat bought of Cobb. This 50 per cent. was afterward paid. The plaintiff further testified, that, in addition, he said to the defendant "will you then take charge of the Cobb claim, bar that from me?" and that to this the defendant said: "You shall never hear of that again; that we will settle ourselves; you need never give yourself any un-

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easiness in regard to the Cobb matter ; that we will settle.” Now it is of vital importance, in the construction of this alleged agreement to determine to what both the parties referred in the phrase Cobb claim. The question, of course, is not, to what, if each had taken other positions than in fact were taken, they might have referred to ? nor to what either in his own mind referred to ? but to what did they both refer, in the use of that term ?

They must have referred to a claim against the present plaintiff. He, of course, would only stipulate for that. If Cobb was right in his action against the defendants’ firm, as stated in his complaint, and as this plaintiff swore in his answer to Cobb some years after, then the plaintiff appeared in the transaction as an avowed agent, and would not be liable to Cobb, and would have no claim against defendants’ firm except for brokerage.

But if his action against the defendants’ firm were well founded, as he asserted by bringing the action and then settling it, and as he therein sued for wheat sold by him to the defendants’ firm, his position, at the time of the agreement, was, that he remained liable to Cobb for the value of the same wheat as a purchaser of the wheat. He had bought the wheat of Cobb, and sold it to the defendants’ firm. If they paid him, he could pay Cobb. Or, if they paid Cobb, the same benefit resulted to him. It would be, in effect, the same thing if they settled with Cobb, for then he could not recover from plaintiff on an allegation that the plaintiff bought the wheat. This latter was the case on the assumption of facts between the parties. Neither Cobb nor the present plaintiff had asserted that the latter had bought as broker without disclosing the principal. Cobb made no such claim until in his action in 1873. Nor as against the defendant has it been shown to be the fact. The conclusion seems to me to be inevitable that the claim which the parties stipulated should be settled, was such claim as Cobb might have against the plaintiff for goods sold and delivered to him absolutely, and not as broker, without disclosure of the principal.

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If these be just views, then the plaintiff could, in this action, only rely upon a cause of action arising out of the making of the agreement, for the reason before stated, that the only claim by Cobb from which the plaintiff at that time considered he was to be relieved, was such that it negatived the notion that the plaintiff had any claims against the defendants' firm excepting as sellers of wheat to them. This latter cause of action has been barred by the statute of limitations.

But this action is not upon the agreement. The complaint contains no intimation that the plaintiff claims upon it. The learned counsel for the appellant takes the position that the making of the agreement operated as a request that the plaintiff should do all the things alleged to have been done. We have seen that if this were right in principle it is not supported by the testimony. The only alternatives for the defendant are either that the plaintiff bought the wheat for himself of Cobb, or as broker, Cobb knowing the principal. If the latter be the fact, the defendant, who had no notice of the action of Cobb against the plaintiff, is not responsible for the consequences of the plaintiff not proving his defense in that action. It cannot be true, I say with deference, that when the testimony does not show that the agreement referred to any claim by Cobb against the plaintiff, based upon the relation of the defendant to the plaintiff as broker and principal, and the testimony does not show that, as a fact, the plaintiff was liable to Cobb on such a claim, the plaintiff can gain any rights by the result of the action, for which and for the testimony and want of testimony in it the defendants were not responsible. The defendant has never before this action been called and given a day to answer as to this. The claim, as stated in the complaint, evidently depends upon its being the fact, that plaintiff bought of Cobb actually as agent for defendants, but did not disclose that defendants' firm were his principals.

The agreement referred to was given in evidence by the plaintiff, and contradictory evidence as to it was given by defendant. No objection was made to the evidence. It

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cannot, for that reason, be assumed that the parties acted as if the agreement were the substantive cause of action intended to be litigated. Evidence as to it was competent under the complaint, as it was to show that in the settlement of the action of plaintiff against defendant the claim of plaintiff, in regard to the Cobb wheat, had been accepted, and also in connection with the position assumed by the complaint as to the liability of plaintiff to Cobb, as ostensible purchaser, while, in fact, broker, to show that the defendant, in the agreement, recognized his obligation to indemnify the plaintiff.

If the agreement created an independent cause of action, as was argued by appellant's counsel, it, as described by the plaintiff, was made upon a valuable consideration, that is upon relinquishing plaintiff's claim to one half of the other amounts due, and was a promise to protect plaintiff from Cobb's claim, which we have already examined. This stood on its own feet, and was to be enforced the same as if there were no question that the plaintiff had not bought as broker, in any sense, the wheat from Cobb.

The counsel for plaintiff did not request the court to charge the jury, as to the obligations of the defendant under the agreement, as itself with a breach, making a cause of action. The only allusion in the charge to the agreement, as to the executory rights of the plaintiff under it, was, that for the reasons the judge stated, the plaintiff refused to include the claim by him against the defendant for the Cobb wheat, in the settlement.

The court charged that if the evidence showed that the plaintiff acted as broker in the transaction, the defendant was liable, unless he had shown that the release by Cobb to the defendant was made with the assent or concurrence of the plaintiff.

The court also charged, that "If in this transaction the plaintiff acted as principal, and made a sale of this wheat to the defendants, the plaintiff cannot recover in the present action." The plaintiff's counsel made to this the only exception to the charge. The charge seems clearly right

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under the circumstances. As the plaintiff did not claim under the agreement, if he did not act as broker for the defendant, the only claim he could have would be as a seller of wheat to the defendant. That claim was barred by limitation of time, as we have already said.

The court of appeals, in its opinion in this case, on appeal (86 *N. Y.* 315), said that the defendants' firm "were originally liable to pay the plaintiff for the wheat which he had purchased for them, upon the obligation incurred by the nature of the contract itself, and the plaintiff had a remedy against them for the price of the wheat sold, which liability does not depend upon the recovery of the judgment by Cobb against the plaintiff." The application of this to the fact of plaintiff selling the wheat to the defendants, if such were the case, is clear. It may be applied, perhaps, to the fact of the plaintiff buying from Cobb, as a broker, disclosing or not disclosing his principal; but in the latter contingency it was left to the jury, on the last trial, to say whether the plaintiff bought as broker.

It seems from the opinion of the court of appeals that the case then showed conclusively or as a matter for the jury to pass upon, that the Cobb claim, intended by the agreement was a claim against the plaintiff based upon the fact that the plaintiff had bought of Cobb as a purchaser, while in fact he was defendants' firm broker. This case shows that no such thing was proved on the last trial or assumed to be the fact at the time of the agreement.

It may be well to see if there were anything done or said by the defendant which would tend to show that at the time of the agreement the parties to it meant to refer to a claim that Cobb might have against the plaintiff, although he in fact was broker for defendants' firm. I can perceive nothing of the kind. What the defense was to the action, in which plaintiff alleged that defendants' firm had bought the Cobb wheat of him, is not shown. The defendant soon after the agreement paid to Cobb about \$1,700 to procure a release for him individually from the claim made in Cobb's action, that the defendants' firm bought the wheat through

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the plaintiff as a broker. This is no admission that Cobb had in such a case any claim against the plaintiff. And on the other hand, any dealing by Cobb with the claim as he made it in the action last referred to, especially any payment upon a satisfaction of it, would tend to relieve the plaintiff from Cobb's claim, as the plaintiff asserted it to be, viz.: that of a vendor to the plaintiff.

The exception that has been particularly examined seems to present the only important question.

I am of opinion that the judgment should be affirmed, with costs, and that the order denying motion for a new trial made upon the minutes should be affirmed with \$10 costs.

FREEDMAN and RUSSELL, JJ., concurred.

HIERONYMUS BREUNICH, APPELLANT, v. SARAH
WESELMANN, RESPONDENT.

Usury—When mortgagor not estopped from setting up defense.—Plea of tender—when not conclusive admission.

Where one who holds a mortgage as assignee of the mortgagee, brings an action for the foreclosure of the same, and the proof shows that the loan secured by it was in fact made by said assignee; that the mortgagee was only a cover, and that the assignee did not rely upon the mortgagor's affidavit, etc., against defenses, the latter is not thereby estopped from pleading the defense of usury.

Where the proof in an action of foreclosure clearly shows that the mortgage was usurious, a plea of tender of a certain amount in the answer cannot be held to constitute a conclusive admission that such an amount is due, the answer also setting up the usury as a defense.

Before SEDGWICK, Ch. J., FREEDMAN and RUSSELL, JJ.

Decided December 30, 1882.

Appeal from judgment in favor of the defendant directed by a judge sitting at special term for the trial of issues without a jury, and from order allowing an amended answer.

The facts are stated in the opinion.

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Kaufmann & Wagner, attorneys, and *Lewis Sanders*, of counsel, for appellant.

Turner, Lee & McClure, attorneys, and *David McClure*, of counsel, for respondent.

BY THE COURT.—FREEDMAN, J.—This action was brought by the plaintiff to foreclose a mortgage of \$1,800, which was made by the defendant to one William Rau, and assigned to the plaintiff.

The weight of the evidence clearly is that the loan for which the mortgage was given was made by the plaintiff to the defendant; that it was usurious; that Rau's name was used only as a cover, and that the plaintiff did not rely upon the defendant's certificate and affidavit nor upon her verbal statement. The plaintiff therefore cannot be held estopped from showing the truth of the transaction.

The exceptions taken by the plaintiff to the exclusion of testimony are, under the circumstances of the case, not tenable.

The only question deserving special notice, is as to the effect to be given to the amended answer. At the close of the evidence on both sides the defendant moved that the answer be amended so as to conform to the proof. The decision of the motion was reserved and the case summed up. Thereafter the following memorandum was filed by the judge who tried the cause, viz.: "The second trial of this case has not removed the objections to the plaintiff's recovery. I therefore find that the defendant have judgment, and that the answer be made to conform to the proofs. Findings to be settled on notice." Upon this an order granting the motion was entered, with the following clause contained therein: "And it is further ordered that the amended answer which is hereto annexed, be filed with this order in the office of the clerk of this court, and that said answer be regarded as the answer of the defendant herein, and be substituted for and take the place of the answer of the defendant heretofore served herein."

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The effect of the amendments thus allowed, passing over those which are not complained of, was to strike from the answer a plea of tender of the amount actually received on the bond and mortgage with interest, which plea had been established by evidence at the trial. As to such plea, therefore, the amendment allowed was not within the scope of the motion made. Moreover, it was an amendment in opposition to the proof. Under these circumstances, and the plaintiff having appealed from said order as well as from the judgment, the order should be reversed so far as it works a withdrawal of the plea of tender, if it should be found that the plaintiff was prejudiced thereby.

The plaintiff claims that he was prejudiced, because on the submission of the case he had requested the court to find that, as matter of law, the plea of tender of the sum of \$1,435 by the defendant was a conclusive admission that that sum at least was due, which request the court refused, and to which ruling the plaintiff excepted. The claim made depends upon the applicability of the legal proposition contended for as an universal rule.

In general, it is undoubtedly true, that a plea of tender is an unequivocal admission of the justice of the plaintiff's claim to the extent of the sum tendered, and that to this extent there is no issue between the parties, and the plaintiff is entitled to receive at least the amount tendered, yet the rule applies only to cases in which there is a valid contract between the parties under which the sum due is the question in dispute. The statute prohibiting usury, expressly provides, however, that all contracts made and securities taken in violation thereof, shall be void (2 *R. S.* 6th ed. 1165, § 5), and that whenever any borrower of any money, goods, or things, in action, shall file a bill for a discovery of the money, goods, or things in action, taken or received in violation of the statute, it shall not be necessary for him to pay, or offer to pay, any interest whatever on the sum or thing loaned ; nor shall any court of equity, require or compel the payment or deposit of the principal sum,

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or any part thereof, as a condition of granting relief to the borrower, in any case of a usurious loan forbidden by the statute (*Id.* § 8).

Consequently the plaintiff has not been prejudiced by the amendments of the answer.

The case had been tried once before, and an opinion filed and a decision rendered in favor of the defendant, when the plaintiff obtained leave to re-open the case to introduce further proof. The issues were retried by the same judge. It was at the end of this second hearing that the defendant's motion was made to conform the answer to the proof. If, in consequence of the granting of the motion to the extent above stated, it had become necessary that the plaintiff should have a further opportunity to make proof, and application for it had been made, there is little doubt but that the application would have been granted. The plaintiff made no such request. Indeed, the case shows that he had every opportunity afforded to him, that he could reasonably claim, to prove the validity in his hands of the mortgage in suit, and that he was unable to establish the fact.

Under these circumstances, and especially as the withdrawal of the plea of tender did not affect the final result, the order need not be disturbed.

The judgment and order appealed from should be severally affirmed with costs.

SEDGWICK, Ch. J., and RUSSELL, J., concurred.

LEONARD HANGEN, RESPONDENT, v. CHRISTIAN
HACHMEISTER, APPELLANT.

Infancy.—*Chattel mortgage of infant, when voidable—where consideration must be refunded to avoid it.*

A chattel mortgage made by an infant in the course of his business, upon which he depends for support, and to enable him to carry on the same, is voidable only, and not void.

Where one who has purchased, with notice, the mortgaged property from the personal representative of the infant, who died during his infancy,

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brings an action to recover damages for an alleged conversion of the property which was after said purchase, taken possession of by the mortgagee under the mortgage, the amount advanced thereon must be refunded before it can be avoided.

It is only where it affirmatively appears that the infant has squandered or lost the property during infancy, and is unable to refund, that the court will not compel him, or those claiming under him, to refund in a case of this character.

The principles and authorities in regard to acts of infants, and the rule in regard to executed and executory contracts made by them, reviewed at length by the court.

Before FREEDMAN and RUSSELL, JJ.

Decided December 30, 1882.

Appeal by defendant from judgment in favor of plaintiff entered upon the verdict of a jury, and from order denying defendant's motion upon the minutes for a new trial.

The facts are stated in the opinion.

Henry Daily, Jr., for appellant.

Richard L. Sweezy and *John H. Glover*, for respondent.

BY THE COURT.—FREEDMAN, J.—This action is brought for the wrongful conversion by the defendant of plaintiff's property, consisting of the contents of the saloon No. 44 Clinton place in the city of New York, and valued at \$700, and upwards. The complaint contains a second count for damages to the extent of \$300 for loss of business, etc., occasioned by the conversion. The answer contains a general denial, and a justification of the taking of the goods and chattels under and by virtue of a chattel mortgage. At the trial it appeared, that on November 1, 1876, one George A. Von Rauscher carried on the business of a lager ~~(bier)~~ saloon keeper at No. 44 Clinton place, and was the owner of the goods and chattels covered by the mortgage. On that day he executed a chattel mortgage on said goods and chattels to his brother August Von Rauscher, conditioned for the payment of the sum of \$340, on or before November 1, 1877, which said sum, according to the language of the mortgage, was further secured by a note

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made by George A. Von Rauscher to August Von Rauscher payable on demand. The mortgage was filed December 12, 1876. By assignment dated April 28, 1877, August Von Rauscher transferred said chattel mortgage to George Ringler & Co., of which the defendant was and is a member, and at the same time delivered to him the promissory note referred to. On October 19, 1877, George A. Von Rauscher died, and thereafter the public administrator was appointed administrator of his estate. On October 27, 1877, the public administrator sold the said goods and chattels and the appurtenances of the saloon at public auction to the plaintiff, who thereupon entered into possession of the place and continued the business with the property thus purchased, and, as is claimed, with other property which he bought and added. On November 10, 1877, the defendant on behalf of the holders of the mortgage entered the premises, and, as it is claimed, took away the entire contents of the saloon.

In order to defeat the mortgage, the plaintiff gave evidence to show that at the time of the making of the mortgage, and also at the time of his death, George A. Von Rauscher was an infant.

The question of infancy was, with others, submitted to the jury, and in respect to it they were instructed in substance, that the mortgage was void, or at least voidable, if George A. Von Rauscher was not twenty-one years old when he made it, and that if they should find, that as matter of fact, George A. Von Rauscher at that time was not twenty-one years of age, the plaintiff was entitled to a verdict for the value of the goods, and that in such case it was not necessary for them to consider the other parts of the case.

The jury having rendered a verdict for the plaintiff for \$800, coupled with a special finding, that the mortgagor was not twenty-one years of age when he made the mortgage, the exceptions taken by the defendant to the part of the charge referred to and to the refusals of the court to charge otherwise, present the following two questions, even if it be assumed that the special finding was correct upon the facts, namely: (1) Was the mortgage void or merely voidable?

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(2) If voidable merely, could it be avoided without the restoration of, or at least an offer to restore the consideration received upon it? The right of the public administrator to avoid his intestate's contracts on the ground of infancy, is co-extensive with, but not greater than the right which the intestate would have, if he were living.

As a general rule, most of the acts of infants are voidable only, and not absolutely void; and it is deemed sufficient if the infant be allowed, when he attains maturity, the privilege to affirm or avoid, in his discretion, his acts done and contracts made during infancy. And though it may sometimes be, and perhaps frequently is, difficult to ascertain the precise line of distinction between void and voidable acts, and between the cases which require some act to affirm a contract in order to make it good, and some act to disaffirm it in order to get rid of its operation; yet all the books are said to agree in one result, that whenever the act done *may* be for the benefit of the infant, it shall not be considered void, but he shall have his election, when he comes of age, to affirm or avoid it. This, says PARKER, Ch. J., in *Whitney v. Dutch* (14 *Mass.* 457), is the only clear and definite proposition which can be extracted from the authorities. The leading case upon this point is *Zouth v. Parsons* (3 *Burr.* 1794), in which it was held by the K. B., after a full discussion and great consideration of the case, that an infant's conveyance by lease and release was voidable only. The doctrine of this case, says Chancellor KENT, in his *Commentaries*, has been recognized as law in this country, and is not now to be shaken. And according to the same learned jurist, the tendency of modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts of infants should be voidable only, and subject to their election, when they become of age, either to affirm or disavow them. For if their contracts were absolutely void, it would follow as a consequence that the contract could have no effect, and the party contracting with the infant would be equally discharged (2 *Kent's Com.* 10th ed. 268, *235).

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It may, therefore, be confidently asserted that at the present day only such acts of an infant are absolutely void as are incapable of being legally ratified. This disqualification exists only to acts which cannot be for the benefit of the infant, and to acts as to which the disability of the infant must be maintained upon grounds of public policy.

The case at bar presents no such exceptional feature. On the contrary, there was sufficient evidence upon which the jury might have found, not only that the giving of the chattel mortgage may have been, but that it was for the benefit of the infant. George A. Von Rauscher depended for his living upon the success of the business carried on by him. The money for which the note and chattel mortgage were originally given, seems to have been loaned to him by his brother August, for the purpose of enabling him to carry on said business. It also appeared that at the time of the transfer to George Ringler & Co., he was indebted to said firm in the sum of \$333, for beer sold and delivered. He was unable to discharge that indebtedness, and yet wanted more beer, which George Ringler & Co. declined to furnish. To secure that indebtedness and also to induce future deliveries, the note and mortgage were at his request transferred by his brother August to George Ringler & Co., and upon the faith thereof the said firm continued to supply him with beer up to the time of his death. At that time his indebtedness had increased to \$693. This evidence should have been submitted to the jury with the instruction that, if they believed it, the chattel mortgage was voidable only, and not absolutely void.

The next question then is, whether, in order to avoid it, it was necessary for the public administrator to restore, or offer to restore, the consideration.

The consequences or effects of the disaffirmance of the acts of infants are different, according as the contract is executory on both sides, or executed on one side and executory on the other, or executed on both sides. The rules applicable to contracts remaining executory on both sides need not be considered here. As to the rules applicable to

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contracts partly or wholly executed, the following authorities may be profitably referred to.

In *Bartholomew v. Finnemore* (17 *Barb.* 428), the rule was laid down that, if an infant has executed a contract on his part, by the payment of money or delivery of property, he cannot afterward disaffirm it, and recover back the money, or claim a return of the property, without restoring to the other party the consideration received from him.

This doctrine was approved by this court in a later case involving the same question, and the rule stated as follows: "The terms on which a rescission will be allowed are, a restoration of the property to the defendant, and the payment of such a sum as, with the payments made on account of the purchase, equals the deterioration of the property in value, caused by the plaintiff's use of it" (*Gray v. Lessington*, 2 *Bosw.* 257).

And in another case, in the late court of chancery, where it appeared that the infant had purchased property and executed a mortgage upon it to secure the purchase money, it was held that, after the infant "became of age he was at liberty to affirm or disaffirm the mortgage. If he affirmed it, he must pay the amount, or deliver the goods, according to its tenor. If he disaffirmed the mortgage, he must restore the goods or account for their value. He cannot affirm the sale and keep the property, and, at the same time, repudiate the mortgage" (*Ottman v. Moak*, 3 *Sand. Ch.* 431).

And in still another case, in the same court, the chancellor laid down the rule that, "an infant cannot retain property purchased by him, and at the same time repudiate the contract of purchase under which he received the property. And when the infant, after he becomes of age, repudiates the sale, the title to the property remains in the vendor, as between such vendor and the infant" (*Kitchen v. Lee*, 11 *Paige*, 107).

Chancellor KENT lays down the rule on the subject as follows: "If an infant pays money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. On

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the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword" (2 *Kent's Com.* *240).

Tyler on Infancy (p. 77), says the rule may be regarded as settled that "if the infant has the property purchased, or consideration received, and it is capable of specific return, he must restore it to the adverse party if he disaffirms the sale."

It is only when it affirmatively appears that the infant has squandered or lost the property or money during infancy, and is unable to refund, that the court will not compel him to make restitution. This principle was enforced in *Green v. Green* (69 *N. Y.* 553), and similar cases, but it is an exception to the rule, as stated above.

The case at bar does not fall within the exception last referred to. George A. Von Rauscher, at the time of his death, left property which, even under unfavorable circumstances—namely, upon a public sale made by the public administrator in the face of the public protest of the mortgagees—brought more than sufficient to satisfy the chattel mortgage.

Nor does the case in connection with the question of infancy, and beyond the mere fact of infancy, disclose any equities affecting the validity of the mortgage, if, indeed, it was good under the statute of frauds. George A. Von Rauscher died an infant. Hence, if the chattel mortgage can be avoided by the public administrator, on the ground of the infancy of the deceased, under the plea that he represents other creditors, the claim of every one of such other creditors is liable to the same objection.

On the contrary, if the chattel mortgage was good under the statute of frauds, the case presents strong reasons why, under the authorities referred to, the plea of infancy should be made to depend upon a restoration of the consideration. George A. Von Rauscher, though an infant, depended upon his business for a living. George Ringler & Co. assisted him.

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They did not know he was under age. The mortgage, in terms, did not purport to secure the payment of the note, but was conditioned for the payment of the sum of \$340 on or before November 1, 1877. To further secure the payment of said sum the note was given. The note was made payable on demand. Upon the faith of the transfer of the note and mortgage, but relying principally, if not exclusively, upon the mortgage, George Ringler & Co. not only allowed their claim for \$333 to stand, but agreed to deliver more beer. Pursuant to such agreement they did make further deliveries, and on account of them George A. Von Rauscher was indebted to them, at the time of his death, in the further sum of \$360. No part of this or of the prior indebtedness has ever been paid. Nor is there any pretense that they ever collected anything upon the note. In every aspect, therefore, that can be taken, George Ringler & Co. parted with full value upon the faith of the mortgage.

Upon the facts, as they appeared, the jury should have been instructed, that if they believed the testimony hereinbefore referred to, and upon it found that, though George A. Von Rauscher was an infant, the giving of the chattel mortgage was beneficial to him, the mortgage was voidable only, and not void; and that, if they further found that the mortgage was not invalid under the statute of frauds, and that George Ringler & Co., upon the faith thereof, parted with value, the public administrator could not avoid it without restoring, or, at least, offering to restore, the value so parted with, not exceeding, however, the amount specified in the mortgage.

For the reasons stated there was error in the charge and in the refusals to charge otherwise.

The questions arising under the statute of frauds as to the validity of the mortgage were properly submitted to the jury; but under the charge delivered, the jury may not have passed upon them, for they were expressly instructed that the plaintiff was entitled to a verdict for the value of all the goods taken, if, as a matter of fact, the deceased was not twenty-one years of age at the time of the making of

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the mortgage, and that in such case it was not necessary for the jury to consider the other parts of the case.

The judgment and order must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

RUSSELL, J., concurred.

CHARLES H. BOHDE ET AL. v. PETER FARLEY.

Agreement of lease and conditional sale.—Waiver of right to take possession.

Where the owner of certain chattels leases the same at a certain rent, the agreement providing that in case of non-payment at the times specified, the right of possession shall thereupon revert in the party of the first part, the owner, and also providing that if within a certain time a specified sum is paid, the chattels shall become the property of the party of the second part—the party of the first part still remains the general owner of the property, and may recover damages for a conversion thereof by a third party, though the right of possession be in the party of the second part.

The mere receipt by the lessor of a part of an installment of rent after the same falls due, is not a waiver of his right to take possession; nor is a naked promise to “not to ask further payments” for a certain time, a waiver of the right to take possession under default theretofore made.

Before SEDGWICK, Ch. J., FREEDMAN and RUSSELL, JJ.

Decided December 30, 1882.

Exceptions ordered to be heard at general term on the dismissal of the complaint at trial term, at the close of the plaintiff's case.

The complaint alleged that the plaintiffs were the owners of a quantity of household furniture delivered by them to one Juliet Schoenrock on November 30, 1878, upon an agreement of lease and conditional executory sale, and that on July 12, 1879, the defendant wrongfully took and converted, and unjustly detains the same; that Mrs. Schoenrock made default in the payment of the rent reserved for

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the use of the furniture, that the plaintiffs had not agreed to extend the time for the payment of the accrued rent, and were entitled to the immediate possession of the property; that on July 30, and after Mrs. Schroenrock had made default, the plaintiffs demanded the return of the property to them, but that the defendant retains it to their damage, &c. There were similar allegations in regard to a quantity of furniture delivered to Mrs. Schoenrock by the plaintiffs on December 3. The plaintiffs also made a similar claim upon an assignment to them in relation to certain household goods delivered to Mrs. Schoenrock on November 23, 1878, by one Stephen A. Spencer. The answer was a general denial.

The agreement on which the furniture first described in the complaint was delivered to Mrs. Schoenrock, was as follows: "This agreement, made by and between Bohde Bros. of the first part, and Mrs. Ernest Schoenrock, daughter of Gen. A. Gridley, of 244 West Fifty-sixth street, city of New York, county of New York, of the second part, witnesseth: The party of the first part hereby rents furniture and bedding, as per schedule, [then follows list] to the party of the second part, for the period of twelve months, from the date hereof, for the consideration of one hundred and fifty dollars paid down and the sum of fifty or more dollars a month, payable promptly at the office of said Bohde Bros., 414 Sixth Avenue, corner of Twenty-fifth street, New York, on the first day of each month consecutively, during the continuance of said agreement, commencing on the nineteenth day of November, 1878. And the party of the second part agrees to use the said furniture with proper care, and pay for the use thereof, the said several sums above mentioned as there specified. In case the said party of the second part shall fail to make said payment on the days above named, unless by special agreement, or shall, in any way, violate any of the agreements hereto, the right of possession of the said furniture shall thereupon revert in the said party of the first part. And it is further agreed by and between said parties, that if the

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party of the second part shall at any time within three months from this date, pay to the party of the first part the sum of \$729.30, the party of the first part will, on receipt of said sum, deliver to said party of the second part all the articles mentioned in schedule as above, with a receipted bill of sale, and it is further agreed by and between said parties, that if full amount is not paid in the period of three months, the sum of \$35 is to be added to the sum above named, and it is further agreed between said parties, that fifteen days grace will be allowed on each payment, and at the expiration of twelve months, if full amount is paid, to deliver the above goods with a receipted bill of sale thereof, but this further agreement is not to be understood as in any way affecting the agreement to rent the furniture as above ; which rented furniture is, and shall remain the property of said party of the first part, until he otherwise hereafter disposes of it, and is not to be removed from the present residence of the party of the second part, without full authority in writing from the party of the first part hereto. In witness, etc."

The agreement of December 3 and the agreement with Spencer were in substance like the above, except that in the Spencer agreement Mrs. Schoenrock was to pay \$50 down, and \$50 a month, payable promptly at Spencer's office on the 15th day of each month, consecutively, during the continuance of the agreement, commencing on January 15.

On the trial the plaintiffs proved the delivery by them to Mrs. Schroenrock of the furniture described in the first two counts of the complaint, and that she paid, at the time of the first delivery, \$145; January 17, \$50; April 4, \$100; May 2, \$25,—in all, \$320 on account of the first contract. Nothing was paid on account of the second. On May 2, Mrs. Schoenrock told one of the plaintiffs that she and her husband were going to Europe; whereupon he said he would wait for further payments on her contracts with him until she got back, she stating that she would likely be gone some time, two or three months. The plaintiffs also proved the delivery by Spencer to Mrs. Schoenrock of cer-

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tain furniture, and the subsequent assignment of his claim to the plaintiffs. Mrs. Schoenrock paid Spencer at the time of the agreement \$50, and on April 4, 1879, \$25, and nothing thereafter. Spencer testified with reference to the transaction, "I allowed the matter to run along different from the contract. I knew of her going to Europe about the time she went." But both he and Mrs. Schoenrock testified that there was no agreement or statement on the part of Spencer that he would wait for further payment until her return from Europe.

Mrs. Schoenrock placed this furniture in a French flat house, 244 West Fifty-sixth street, owned by the defendant. This flat had been rented from the defendant by her husband. She, with her husband, went abroad on May 5, 1879, leaving this furniture in those apartments in charge of a servant. She returned July 26, 1879, and upon going to the apartments was denied admission, and ascertained that the furniture left there had been sold at auction by the defendant's direction and bought in by him.

On July 12, 1879, the defendant took possession of the premises and sold the furniture in question at auction, himself being the purchaser, for the sum of \$144. There is a mention in the bill of sale that the sale was upon a chattel mortgage; but there was in fact no chattel mortgage, although there had been some conversation between Mrs. Schoenrock and the defendant, before her departure for Europe, about giving a chattel mortgage to secure the rent which should accrue during her absence. On July 29, 1879, written demands upon the defendant were made by the Bohdes and by Spencer through their attorney for the return of the furniture in question.

The trial judge dismissed the complaint at the close of the plaintiffs' case, on the ground that "the plaintiffs have not made out a case, not having proved that they demanded payment of the installments from Mrs. Schoenrock and that she refused to pay them; that, therefore, they had not shown that they are entitled to possession."

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Arthur Furber, for appellants.

Barnum & Rebhan, for respondent.

BY THE COURT.—HORACE RUSSELL, J.—[After stating the facts as above.]—The decision below was put entirely upon the technical ground that the plaintiffs were not entitled to the right of possession as between them and Mrs. Schoenrock, and, therefore were not in position to maintain an action against a wrongdoer for the conversion of property of which they were the general owners.

I cannot agree to either branch of the proposition.

1. That the plaintiffs were the general owners of the property, there can be no question. The validity of agreements of lease and conditional sale, such as the one before us, has several times been under consideration by the courts of last resort and everywhere recognized and upheld (*Cole v. Mann*, 62 *N. Y.* 1; *Bean v. Edge*, 84 *Id.* 510; *Coman v. Larkey*, 80 *Id.* 345; *Ballard v. Burgett*, 40 *Id.* 315; *Austin v. Dye*, 46 *Id.* 500).

In these cases the title of the vendor, under agreements like the one before us, was held to be good as against *bona fide* purchasers for value. It would, then, certainly have been so as against a tortfeasor.

I think the plaintiffs were entitled, even as between them and Mrs. Schoenrock, to the possession of the property, and that, if they were not, while they might not have been able to maintain the action of trover, under the old forms of pleading, they would have been able to maintain case.

The complaint complies with the rule established by the Code by stating the facts, and while it follows more particularly the old declaration in trover, it would, I think, have been good for trover, trespass, or case, and, except in its prayer for relief, for detinue and replevin. The old forms of pleading having been abolished, if the complaint and the proof given in its support entitled the plaintiffs to any relief, it should not have been dismissed. The extent of the old cases was, that while a general owner not entitled to

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possession could not maintain trover as against a wrongdoer, he could maintain case and recover as damages the value of his reversionary interest in the property (*Gordon v. Harper*, 7 *Term R.* 913; S. C., 2 *Esp.* 465; *Hall v. Pickard*, 3 *Camp.* 186; *Golightly v. Ryn*, *Lofft.* 89; *Corfield v. Coryell*, 4 *Wash. C. C.* 371; *Fairbanks v. Phelps*, 22 *Pick.*; *Billings v. Tucker*, 6 *Gray*, 368; *Ayer v. Bartlett*, 9 *Pick.* 156; *Forbes v. Parkhurst*, 16 *Id.* 492).

In *Ayer v. Bartlett*, a well-considered case, which was twice before the supreme court of Massachusetts (6 *Pick.* 71; 9 *Id.* 156), A. sold a factory and machinery to S. upon an agreement that A. should continue the owner until S. paid certain promissory notes given for the purchase price, S., in the meantime, to have possession. Before the first note became due the machinery was attached as S.'s property. A. brought an action against the officer containing declarations in trover and case. It was held that, although trover could not be maintained, case might be for the injury to A.'s reversionary interest, and that the measure of damages was the value of the property as it stood in the factory before removal.

So, a mortgagee may bring case against a person taking property on process from the possession of a mortgagor in possession, although the mortgage debt was not due at the time of such seizure, and in such an action may recover the value of his interest (*Fairbanks v. Bloomfield*, 5 *Duer*, 434).

2. But I think the plaintiffs were entitled to the possession of the property, even as against Mrs. Schoenrock.

By the terms of the first contract between them, dated November 19, 1878, she was to pay \$150 down at the time the goods were delivered to her, and \$50 a month thereafter at their office, on the first day of each month consecutively, and, in the event of her failure to make payments in accordance with that stipulation, the right of possession of the furniture was thereupon to revert in the plaintiffs. The evidence is, that Mrs. Schoenrock paid to the plaintiffs only \$145 at the time the agreement was made; \$50, January 17,

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1879 ; \$100, April 4, 1879 ; \$25, May 2, 1879—in all, \$320, on account of the first contract, and nothing upon the second.

On her agreement with Spencer she paid \$50 at the time the agreement was made ; \$25, April 4, 1879. Clearly, then, Mrs. Schoenrock was in default, and the plaintiffs, and Spencer, their assignor, were, for that reason, entitled to possession of their property unless they did something amounting to a waiver of that right and continuing to operate as such at the time this action was brought. So far as Spencer is concerned, the only evidence is, that he “allowed the matter to run along different from the agreement,” from which we might infer that he received the \$25 paid by Mrs. Schoenrock, April 4, 1879, without acting upon his right to take possession upon default. The plaintiffs apparently did the same thing, and, in addition, told Mrs. Schoenrock when she was about to go to Europe, that that they would wait for further payments on her contracts until she got back.

A mere extension of time is not a waiver of anything. (THOMPSON, Ch. J., in *Peterson v. Clark*, 15 *Johns.* 204 ; see also *Evans v. Thompson*, 5 *East.* 193).

‘A waiver to be operative must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting upon performance of the contract or forfeiture of condition’ (MULLIN, J., in *Ripley v. Ætna Ins. Co.*, 30 *N. Y.* 164—quoted, with approval, as the “true rule” by EARLE, J., in *Underwood v. Farmers’ Joint Stock Ins. Co.*, 57 *N. Y.* 506).

It can scarcely be claimed that there was any new consideration moving from Mrs. Schoenrock to Spencer after her last payment to him. The receipt of \$25 on April 4, by Spencer, long after it was due, cannot be regarded as such an act as should estop him from insisting upon forfeiture (*Gardner v. Clark*, 21 *N. Y.* 399, 404).

There can be no doubt whatever, then, that Spencer was entitled to take possession not only when he made an as-

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signment of his claim to the plaintiffs, but even at the time Mrs. Schoenrock went to Europe. The position of the plaintiffs as to the goods delivered by them to Mrs. Schoenrock differed from that of Spencer only by reason of the fact that they promised her not to ask further payments until her return from Europe. She was then in default to them. There was no consideration for this promise. It was a mere promise to extend time, not binding in law either as a promise or as a waiver, so far as previous defaults were concerned. It was binding as a waiver by way of estoppel, so far as future defaults were concerned, but the plaintiffs had the right to take possession at that time for the defaults which had already occurred, under the decisions I have quoted.

But, assuming that the plaintiffs legally waived their right until Mrs. Schoenrock returned from Europe, that waiver expired by its own limitation before this action was brought. The terms of the contract required Mrs. Schoenrock to make payment on certain days at the office of the plaintiffs. The extension affected only the time, not the place or manner of payment.

It cannot be still further extended by the court altering place and manner, and requiring plaintiffs to seek her out and make demand. The event by which they had fixed a new limitation of time had transpired. She had returned from Europe. The extension was thereby terminated, and no demand was necessary (*Stacy v. Graham*, 14 *N. Y.* 492; *Bruce v. Tilson*, 25 *Id.* 194; *Adams v. Fort Plain Bank*, 36 *Id.* 255; *Mygatt v. Wilcox*, 45 *Id.* 306; *Foot v. Farrington*, 41 *Id.* 164).

The exceptions should be sustained and a new trial ordered, with costs to abide the event.

SEDGWICK, Ch. J., and FREEDMAN, J., concurred.

Statement of the Case.

JAMES L. SHARP, APPELLANT, v. DAVID J. HUTCHINSON, IMPEADED, ETC., RESPONDENT.

Limited partnership—how pleaded.

Where the complaint in an action against partners for goods sold the firm, alleges a general partnership only, and seeks recovery against defendants as members thereof, and the answer of one of the defendants sets up a limited partnership, as to him, by way of avoidance, plaintiff on the trial may show the falsity of the statutory certificate as to payment of capital, etc., for the purpose of charging said defendant as a general partner.

Whether, if defendant had not pleaded the limited partnership, such evidence would have been admissible, *quære*.

Before SEDGWICK, Ch. J., FREEDMAN and RUSSELL, JJ.

Decided February 5, 1883.

Appeal by plaintiff from judgment dismissing complaint as ordered on trial before a jury.

The complaint was for goods sold and delivered to the respondent and the other defendants as partners in trade. The answer denied each of the allegations excepting such as were thereafter expressly admitted. It further alleged that, under the statute, etc., a limited partnership was formed, in which the general partners were the other two defendants, and he, the answering defendant, was a special partner and "was not otherwise interested in or related to said partnership or its business, and that said limited partnership continued at the several times mentioned in the complaint." The title of the firm was Hogg & Patterson. On the trial it was proven that the goods specified in the complaint were sold and delivered to Hogg & Patterson for the prices alleged. The plaintiff, then called as a witness, Andrew H. Hogg, one of the firm. He identified a certificate and affidavit which were read in evidence, and were the papers executed to form, under the statute, the limited partnership set up in the answer. These papers stated that David J. Hutchinson (the respondent here) had contributed to the partnership the sum of \$10,000. Plaintiffs' counsel then asked the following questions: Q. "At the time of

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the verification of this affidavit, had Mr. Hutchinson actually paid \$10,000 into the capital of the concern of Hogg & Patterson?" Q. "Was any actual cash, otherwise than a check for \$8,000, contributed by Mr. Hutchinson to the copartnership formed?" These questions were objected to severally by defendant's counsel as irrelevant to the issue. The objection was sustained on the ground that there was no issue which sustained the questions, as the complaint does not state the cause of action for which plaintiffs' counsel claimed to recover. There was no other testimony as to the defendant being a partner, and on motion the court dismissed the complaint.

There was no reply.

Robertsons, Harmon & Cuppia, for appellants.

George H. Forster, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—If, in this action, the defendant had not in the answer set up the existence of the limited partnership, it might have perhaps been necessary to determine whether an allegation of general partnership is supported by proof that the certificate or affidavit filed under the statute to form a limited partnership was false. One question would be, does the negating the assertions of the certificate or affidavit tend to show that such facts as are essential to copartnership had an existence? Or does it tend only to show the liability as a partner, under the statute? Another question would be, if it tend to show only the latter, must not the special facts, which under the statute create the liability, be pleaded?

But when the defendant, to a complaint of general partnership, avers the making of the limited partnership, the ground of the exclusion of the questions on the trial in this case cannot, in my judgment, be sustained. The ground was that, to show the falsity of the certificate or affidavit was not relevant to any issue in the case, as the complaint did not state a cause of action based upon the falsity. There was, however, an issue arising from the answer to which the questions were relevant, and which required their

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admission, unless they had been excluded on an objection which was not taken, and which perhaps would not be held to be sound, that is, that the testimony should not be called for until the defendant had given his case. Section 522 of the Code of Civil Procedure declares that allegation of new matter in an answer is to be deemed controverted by the adverse party.

I do not see how the defendant in this case can avoid the effect of *Stone v. De Puga* (4 *San.* 681), so far as it goes, for the pleading in this case follows the determination there made. It does not seem that the state of the code then in force, that made a reply to new matter in the answer necessary, if it were to be controverted, affects the question. The present Code (§ 516) is, that when an answer contains new matter constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter. This is an answer to the suggestion that unless the complaint state the special facts under the statute the defendant may not be notified of the facts on which the plaintiff intends to rely.

Or it may be further suggested that such new matter in answer is not a defense by way of avoidance. It seems, however, to be set up as avoidance, because it pre-supposes that the plaintiff would have a right to show facts, from which an inference of general partnership might be drawn, but which would be avoided by proof of the defense.

I am of opinion that the judgment should be reversed and a new trial ordered, with the costs of the appeal to the appellant to abide the result.

FREEDMAN, J., concurred.

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MARIE PRESCOTT, RESPONDENT, v. SINCLAIR
TOUSEY, APPELLANT.

Appeal—waiver of by recognition of judgment.

Where the defendapt pleads as a defense that the damages sought to be recovered were embraced in a judgment obtained in a former action, “which judgment still remains in full force and effect,” and subsequently and before the time to amend as of course expires, serves a new answer omitting such defense, this will not be held inconsistent with, or a waiver of, a right of appeal from said judgment in such former action.

Before SEDGWICK, Ch. J., TRUAX and O’GORMAN, JJ.

Decided February 5, 1883.

Motion by respondent to dismiss appeal.

The plaintiff brought this present action for libel, and recovered judgment. From this judgment defendant took the present appeal. The plaintiff, after the entry of judgment, brought another action for libel against the defendant. The defendant served an answer, in which he set up, as a defense, that the damages sought in that action were embraced in the recovery in this action, the answer alleging, in due form, the recovery of the judgment, and that “said judgment still remains in full force and effect.” To this defense there was a demurrer. The plaintiff served a notice that the demurrer was withdrawn, and it was not argued within twenty days from service of the demurrer, the defendant served an amended answer, which omitted the defence as to the judgment in the present action. This amended answer was returned, but on motion the court at special term held that it was properly served.

The ground of the present motion is, that the defense, in the original answer, was inconsistent with this appeal, one asserting a right under it, as if it were final, and valid, and the other seeking to reverse it.

Marshall P. Stafford, for motion.

William Fullerton, opposed.

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BY THE COURT.—SEDGWICK, Ch. J.—My opinion is, that for the purpose of examining the ground in which this motion is urged it should be held that the original answer, setting up the recovery of damages in this action, was not an absolute and definitive proffer of an issue on which the defendant intended to rely, but as to the issue in the second case it was conditional upon the non-exercise of the right to amend it once, as of course. It was the same as if the defendant had had the power to express such a condition in the answer itself. Upon the amended answer being served, the first answer went for nothing *ab origine*, save as otherwise provided by section 542 of the Code of Civil Procedure. That provides that the amendment must be without prejudice to the proceedings already had. This refers only to proceedings in the action, and, of course, does not refer to the intrinsic qualities of the answer allowed to be withdrawn, and its effect as to rights claimed outside of the action itself. If this consideration be correct, then, it is not necessary to deny that if the defendant had, for any purpose or any length of time, taken an advantage from the judgment, as if it were valid, he could not retract, and the election would be final. The position is, that the advantage, it is alleged he could have, would be such as would arise from his setting it up to defeat the claim in the action, and that he does not set it up, substantially, until his power to change it has passed from him.

I am of opinion that the motion should be denied, with \$10 costs.

TRUAX and O'GORMAN, JJ., concurred.

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WILLIAM H. RUTTY, APPELLANT, v. AUGUSTINE E.
PERSON, ET AL., RESPONDENTS.

Special issues—when motion for premature—when not granted.—Reference by the court.

An order requiring that the special issues be framed and tried by jury, will be reversed on appeal where it appears that the motion was noticed before the plaintiff's time to reply or demur to the counter-claim set up in the answer had expired.

Though the granting of such a motion in a proper case is in the discretion of the court, yet where it appears that the issues as framed are so minute and numerous, and so grouped that confusion and mistake by a jury may be expected, the appellate court will reverse the order.

At any stage of an equity case to be tried by the court without a jury, when it becomes manifest that a reference will serve the ends of justice, the court will order one.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 5, 1883.

Appeal by plaintiff from order granting motion by defendant that special issues be framed and tried by jury. The complaint prayed for an accounting

The answer was served November 25, 1882, and contained a counter-claim. The notice of motion to settle issues was served November 25, 1882, upon the same day as the service of the answer and before the reply was served; but the pleadings, including the reply, were before the court on the hearing of the motion.

Further facts appear in the opinion.

Eugene H. Pomeroy, for appellant.

Ludlow Fowler, for respondents.

BY THE COURT.—SEDGWICK, Ch. J.—In the first appeal the order below must be reversed on the ground, that the motion was made before the time to reply or to demur to the counter-claim had expired. It is expedient to hold to

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the practice of having all the issues in the action joined before noticing such a motion.

The merits of the motion, however, call for some observations. The complaint and answer show that the issues of fact do not relate to a few differences of controlling importance; but in respect to what was the agreement of the parties, each side averring an agreement consisting of many details and provisions, and modified from time to time. In my judgment, no special issues could be framed, the verdict as to which by a jury would be of special benefit in arriving at a judgment as to the rights of the parties. The issues that were framed are so minute and numerous, yet grouped under questions twenty-seven in number, that confusion and mistake by a jury may be expected. Under the pleadings and proofs, a court or referee, by protracted attention, might find the plaintiff right in part and the defendant right in part, discriminating between material and immaterial allegations, rejecting surplusage, and considering the pleadings as amended in the proper exigencies. But the special issues are to be propounded to the jury as if they were to answer Yes or No each question. Perhaps they would have power to answer each question partly Yes, and partly No. It would seem impracticable to obtain from the twelve men a unanimous consent to each of these possible modifications and limitations.

I am therefore of opinion, that it appeared to be a case where special issues should not be framed for a jury.

The order appealed from should be reversed, with \$10 costs.

Appeal by plaintiff from order denying his motion, that a referee be appointed to hear and determine.

As to the second appeal, which was from an order denying plaintiff's motion for a reference, I am of opinion that the court properly exercised its discretion. At any stage in the case, as it is an equity case to be tried by the court without a jury, when it becomes manifest that a reference will serve the ends of justice, the court will direct one. At

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present, it is expedient that more light should be had as to what is proper to be tried by the court and what by a referee.

The order is affirmed, with \$10 costs.

TRUAX and O'GORMAN, JJ., concurred.

CORNELIA D. EARLE, APPELLANT, v. WILLIAM P. EARLE, RESPONDENT.

Guaranty companies—justification as sureties.

The corporations which, under chapter 486 of the Laws of 1871, are vested with authority to guarantee bonds and undertakings in judicial proceedings, need not possess the qualifications required of sureties by the Code, though the manner of justification is the same; but it is the duty of the judge to whom the undertaking or bond is presented for approval, to exercise his discretion in each particular case as to whether the actual statement of the company's business justifies an approval.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 5, 1883.

Appeal by plaintiff from order approving an undertaking given by the defendant on an appeal from the general term to the court of appeals.

The undertaking was signed by the defendant. No sureties were given, but the performance of the undertaking was guaranteed by a corporation called the Fidelity and Casualty Company. This guarantee was claimed to be valid for the purpose, under the provisions of an act to facilitate the giving of bonds required by law (Laws 1871, chap. 486), which enacted: "Section 1. Whenever any person who now or hereafter may be required or permitted by law to make, execute, and give a bond or undertaking with security conditioned for the faithful performance of any duty, or for the doing or not doing of any thing in said bond or undertaking specified, any head of department, surrogate, judge, sheriff, district attorney or any other officer who is now or shall hereafter be re-

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quired to approve the sufficiency of any such bond or undertaking, may, in the discretion of such officer, accept such bond or undertaking and approve the same whenever the conditions of such bond or undertaking are guaranteed by a company duly organized or authorized to do business under the laws of this State, and authorized to guarantee the fidelity of persons holding positions of public or private trust; and all such corporations are hereby vested with full power and authority to guarantee such bonds and undertakings; but this act shall not prevent a justification on the part of such company through its officers as required by law of other sureties.

“§ 2. It is further provided that the guarantee of any such company shall not be accepted by heads of departments, or others, as provided in section one of this act, whenever its liabilities shall exceed its assets, as ascertained in the manner provided in section three of this act.

“§ 3. Whenever the liabilities of any such company shall exceed its assets, the superintendent of the insurance department shall require the deficiency to be paid up within sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency, and he shall publish the same once a week for three weeks in the State paper, and thenceforth and until such deficiency is paid up, such company shall not do business under the provisions of this act. And in estimating the condition of any such company under the provisions of this act, the superintendent shall allow as assets only such as are authorized under existing laws at the time, and shall charge as liabilities in addition to eighty per cent. of the capital stock, all outstanding indebtedness of the company, and a premium reserve equal to fifty per centum of the premiums charged by said company on all risks then in force, nothing herein contained shall apply to bonds given in criminal cases.

“§ 4. This act shall take effect immediately.”

It was admitted by the parties, that if the rule of the Code applicable to the justification of sureties, to wit: that

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the surety must be worth double the amount of the bond over and above all existing and contingent liabilities, be applied in this case, the undertaking was insufficient.

The court approved the undertaking by an order, from which plaintiff appealed.

Carlisle Norwood, Jr., for appellant.

John M. Martin, for respondent.

Moore, Low & Sanford, for The Fidelity and Casualty Co.

BY THE COURT.—SEDGWICK, Ch. J.—My construction of the act is as follows: If a bond or undertaking is proposed which is to be secured by the guarantee of the company, the party opposed may require “a justification on the part of such company through its officers as required by law of other sureties.” If it should appear on such justification that “its liabilities exceed its assets, as ascertained in the manner provided in section three of this act,” the act forbids the acceptance of the guarantee. The alternative is not that the court shall approve absolutely and under all circumstances. As stated in the first section, the court must exercise its judicial discretion to determine whether the financial condition of the company would justify an approval. I do not think that the act implies that the company *must* possess the qualifications required of sureties, although the manner of justification is to be same as when sureties justify. The nature of the business makes it clear that the Legislature knew that such qualifications could not exist. If the Legislature intended that the company should show such qualifications, it was not necessary to provide anything further on the subject, and especially to prohibit the approval of the undertaking if the company’s condition did not reach the standard specified by the third section. But although the company may be in the condition described by section three, it is the duty of the judge to exercise his discretion in each particular case,

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as to whether the actual state of the company's business justifies an approval of the undertaking.

It may be, that in the present case the court did not exercise the discretion referred to. If it did not, the general term should make the order, that would be called for by the particular circumstances. In my opinion, the circumstances called for an approval of the undertaking, which was actually approved below. There should be no costs on the appeal to either party.

Order affirmed, without costs.

TRUAX and O'GORMAN, JJ., concurred.

JAMES S. FLYNN, RESPONDENT, v. THE NEW YORK
ELEVATED R. R. CO., GEORGE A. WILLIAMS AND
JOHN TWINAME, APPELLANTS.

*Negligence—interference with the highway.—Evidence—declaration of servant,
when admissible against master.*

Whenever a natural person or a corporation is authorized by way of duty or privilege, to disturb the surface or bed of a highway, in the exercise of the right, due diligence must be used to prevent accidents to wayfarers.

This obligation is independent of the obligation to do the work skillfully, and is not lessened by the fact that the right to interfere with the highway is exercised by means of a contract with other persons. The duty is imperative, so long as the interference with the highway exists, and no notice thereof is necessary to charge the party exercising such right.

In an action against defendants to recover for damages from an accident happening through a breach of such an obligation, evidence to show that on the night of the accident a watchman employed by defendants, stated "that it was his last night as watch, and he didn't think it worth while to put lamps out on the holes," is inadmissible against said defendants, and its reception is error, demanding a new trial.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 5, 1883.

Opinion of the Court, by SEDGWICK, Ch. J.

Appeal by defendant The New York Elevated Railroad Company, and a separate appeal by the other defendants jointly, from judgment entered on verdict for plaintiff, and from order denying motion for new trial made upon the minutes.

The action was for damages from the alleged negligence of the defendants. The New York Elevated Railroad Company was a corporation duly authorized by statute to make excavations in the streets of New York, for the purpose of building its road as authorized by statute. It was alleged, that at a certain point on its line, an excavation had been made by it, through contractors, viz.: its co-defendants, Williams and Twiname; that though the excavation had been partly filled up, the pavement, which was of stone in blocks, had not been replaced; that the other defendants were the contractors who had made the excavation and had omitted to replace the stones; that the excavation not being guarded in any way or lighted, was dangerous to passers by; that the plaintiff was passing by in a wagon, in a prudent manner, that one of the wheels sunk into the excavation, which caused the plaintiff to be thrown to the ground and injured.

On the trial it was held, under the allegations of the complaint, that the verdict should be for defendants, unless the testimony was sufficient to show that the defendants Williams and Twiname were responsible for negligence in respect of the condition of the excavation.

The jury found for plaintiff.

Further facts appear in the opinions.

R. E. Deyo, for appellants, The New York Elevated R. R. Co

W. R. Spooner, for appellants, Williams & Twiname.

Louis J. Grant, for the respondent.

BY THE COURT.—SEDGWICK, Ch. J.—The liability of all the defendants was made at the trial to turn upon the verdict of the jury as to whether the defendants Williams and

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Twinaime were liable. They could not be liable unless the evidence showed that they had not replaced the pavement at the place where the accident happened, after they had finished the other work which they had done under their contract with the railroad company. In my opinion, the clear preponderance of evidence in the whole case, was that they had finished the work, replaced the pavement, and were no longer under any responsibility as to anything to be done. For this reason, I think the the motion to dismiss the complaint and also for a new trial should have been granted.

I also am of opinion, that the objection to the question as to a witness's conversation with a watchman should have been sustained. The question was intended to and did call out testimony that the watchman, on the night of the accident, but before its occurrence, said it was his last night on watch, and he didn't think it worth while to put lamps out on the holes. It was shown that the watchman was employed by the defendants Williams and Twinaime, but such a declaration by their servant was not evidence against them.

The fundamental obligations of the defendants were not much discussed upon the argument of the appeal. The argument that was made requires some attention. It would not, I conceive, be denied by any of the learned counsel, that whoever, a natural person or corporation, is authorized to disturb the surface or bed of a highway, whether by way of privilege or duty, must in doing it use ordinary diligence to prevent accidents to wayfarers from the impaired condition of the road. For instance, to guard against persons or vehicles falling into the hole, if such be the kind of work, fencing must be made or notice given by lights; or rather, due diligence must be used to give such kind of protection to passers by.

The giving this kind of protection is a thing separate from the doing of the work that disturbs the highway. The obligation to do the work skillfully and not negligently would not involve the obligation to warn passers by of the

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fact that the work was going on. They would be injured by falling into an excavation skillfully made as much as if it were negligently made.

Therefore, when the defendant, the company, exercised its right of making the excavation in question, if proof should show that it did make it, independent of that was their obligation to use due diligence in respect to passers by. The fact that the right is exercised by means of a contract made with other persons, does not lessen the obligation referred to. The obligation is imperative so long as the excavation exists; and, therefore, notice that it is not sufficiently protected is not a condition of legal responsibility for injuries from the excavation.

For the reasons that have been given, I am of opinion, that the judgment should be reversed and a new trial ordered with the costs of the appeal to the appellants, severally, to abide the event, and also that the order denying the motion for a new trial should be reversed with \$10 costs to the appellants, severally, to abide the event.

TRUAX, J., concurred.

O'GORMAN, J.—[Concurring.]—This action was brought to recover damages from the defendants, or some of them, for injuries inflicted on the plaintiff, on the evening of November 26, 1878, by reason of the insecure and dangerous condition of Third avenue between One-hundred and One-hundred-and-third streets in this city.

The complaint charges as against The Elevated Railroad Co. that they were engaged then in the construction of their railroad between One-hundred and One-hundred-and-third streets on Third avenue, and had employed the other defendants Williams and Twiname to make excavations thereon; that these excavations were made without due precautions; that the plaintiff while driving a loaded truck on Third avenue between said streets was thrown from his seat and seriously injured by the wheel of his truck slipping into one of such excavations. The gist of this action is the negligence of the Elevated Railroad Co. by the negli-

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gence of their employees Williams and Twiname, in making the excavation and leaving it unprotected and in an unsafe condition and without lights to warn passengers of the danger. At the close of plaintiff's testimony, motions were made to dismiss the complaint on the part of the mayor, etc., of New York, because no notice to them of the unsafe condition of the avenue had been proved; on the part of the Elevated Railroad Co. because (1) no such notice to them had been proved; (2) because it was not shown that they or their agents had made the hole or excavation in question, or caused it to be made; and on the part of Williams and Twiname, because there had been no evidence produced to hold them. These motions were denied by the court except as to the mayor, etc., of New York, as to whom the complaint was dismissed. At the close of the case, similar motions were made on the part of the Elevated Railroad, and also on the part of Williams and Twiname, which motions were denied. The jury rendered a verdict for the plaintiff against the Elevated R. R. and also against Williams and Twiname, and motions were then made on behalf of the defendant to set aside the verdict as against the weight of evidence, on the ground that the damages (\$5,000) were excessive, and on exceptions taken by defendants to the refusal of the judge to charge as requested by them, which motions were also denied. Exceptions were also taken by defendants to the admission of testimony in the course of the trial.

The first subject of inquiry is, whether, on the whole case, there was enough of competent evidence to go to the jury in proof of the negligence of the defendants The Elevated Railroad Co., or their agents Williams and Twiname. The material facts as they appear in evidence are as follows: When this accident to the plaintiff occurred it was quite dark, and there was no light at or near the hole in Third avenue into which the wheel of his truck slipped. The depth of the hole is variously stated at from two to three inches, or from six to seven inches, or the depth of one of the Belgian pavement blocks. The exact locality of

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the hole was about twenty or twenty-five feet south of One-hundred-and-second street, on the east side of the avenue. In the center of the hole stood one of the columns of the Elevated Railway, and this column was then in position in its abutment, and the girder and superstructure, excepting the rails, were built above. The paving stones at the time of the accident had been removed for a space of about fourteen to sixteen inches all round the column. There is evidence that this hole existed two days before the accident. The columns, at the time of the accident, were fixed in their bases, which were large castings of iron made to receive the columns. In these iron castings were sockets into which the columns had been fitted, and this work had all been done so that the columns were then firm and the laying of the girders above them had been begun. These columns were at the time so set on both sides of the avenue from One-hundredth street to One-hundred-and-twenty-ninth street. The defendants Williams and Twiname entered into a written contract with the Elevated Railroad Co., on June 25, 1878, by which they agreed to make the necessary excavations for, and to build foundation piers along Third avenue between One-hundred and One-hundred-and-twenty-ninth streets, and to put in the piers the iron bases for the columns, which were to be furnished by the Elevated Railroad Company, and to provide all necessary guards, railings, lights, and watchmen, that might be necessary for public safety. The setting up of the iron columns in the sockets, however, and the pinning them and leading them and removing the pavement for the purpose of pinning and leading them and the re-laying of the pavement after that work was done, was not a part of the work which Williams and Twiname were bound to do under their contract, but was provided for in another contract made between the Elevated Railroad Company and the Ætna Iron Company, which contract also bears date June 25, 1878. This latter company contracted to deliver ready for use the column bases on Third avenue between One-hundred and One-hundred-and-twenty-ninth streets, and to pin the columns according to

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the specifications, to make excavations and remove the pavements around the columns for the purpose of tightening them, and after that work had been done to re-lay the pavement in a perfect manner true to the street grade as directed by the Inspector of the Board of Public Works, and to repair and make good all imperfect or settled pavement re-laid by him during a period of six months after the completion of the work. There is no direct evidence showing by whom the hole into which the plaintiff's wheel slipped, was made, or when it was made. There is evidence that Williams and Twiname had finished all their work on the Third avenue between One-hundred and One-hundred-and-third streets and as far as One-hundred-and-twenty-ninth street before the accident took place, and that their work of re-filling and re-paving was completed to One-hundred-and-third street on the east side of the avenue, on November 9.

The plaintiff in order to sustain his action against Williams and Twiname was bound to prove by a preponderance of evidence that they had been guilty of negligence which caused the injury to the plaintiff. Such evidence is not to be found in this case unless it can be inferred from certain testimony offered on the part of the plaintiff and admitted by the trial judge against the objection of defendants.

The witness Connelly testified to a conversation had on the night of the accident and relating to the hole in question with a night watchman named Smith, whom he, Connelly, had been in the habit of seeing there every night, and whose duties, as far as the witness knew, were to put red lamps out at the hole and see that no accident occurred. Witness further testified that Smith told him that it was his last night on watch and he did not think it worth his while to put lamps out on the holes. This testimony was hearsay and incompetent, and, although Smith, when called as a witness for defense, contradicted Connelly as to the alleged conversation, yet the admission of this testimony at the stage of the case when it was admitted might have pre-

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judiced the plaintiff's case with the jury and materially influenced their verdict. A similar question arose in *Eccleson v. Columbia Turnpike Road* (82 *N. Y.* 279, 282), and because of the admission of such testimony the judgment was set aside and a new trial ordered. See also *Pinney v. Orth* (88 *N. Y.* 447, 453).

The relations between the Elevated Railroad Company and Williams and Twiname were such as would have made the former legally responsible for the negligence of the latter in regard to this excavation which caused the injury to the plaintiff. Williams and Twiname had been unable to carry out their written contract with the Elevated Railroad Company, and at the time of the accident and for some months previous they had acted under another and more indefinite arrangement with the company, retaining, however, the right and exercising the power to employ and dismiss their own servants as they pleased in the performance of their work. But the nature of the work itself done for the Elevated Railroad Company in making these excavations in the public streets was dangerous, and the company could not escape responsibility for putting the street in a condition dangerous to travel at night by interposing any contract which they had made for doing the very thing which caused the damage (*Storrs v. Utica*, 17 *N. Y.* 108; *Burmeister v. Elevated R. R. Co.*, 47 *Super. Ct.* 267; *Worster v. Forty-second street R. R. Co.*, 50 *N. Y.* 205).

The jury rendered a verdict against both defendants, the Elevated Railroad Company and Williams and Twiname; and as we do not think that such a verdict is sustained by the evidence, the judgment for the plaintiff should be reversed and a new trial ordered.

Statement of the Case.

GEORGE CRAWFORD, APPELLANT, v. WEST SIDE BANK, RESPONDENT.

Banks and banking—payment of altered check—when bank not entitled to charge against depositor.—Laches.

The plaintiff, a depositor with defendant, intending to leave town, drew a check on April 20, payable to the order of A., his clerk, dating it the 22d, with instructions that if he did not return on that day A. should draw the money and give it to plaintiff's foreman for the purpose of paying workmen. On the 21st A. altered the check by erasure so that the date read April 21, indorsed it, presented it to the defendant, who paid him its amount. A. absconded with the money. In this action to recover the sum named in the check,—*Held*, that such amount should not have been charged against the plaintiff; that the taking of the check afterwards by the plaintiff for the purpose of prosecuting A., did not ratify the alteration, or estop him from bringing this action; and that the plaintiff was not guilty of laches in leaving the check with his clerk, nor in making it payable to his clerk's order.

The bank was bound, as against plaintiff, the depositor, to ascertain that the check was genuine in all respects, and when the date was forged, the check ceased to be the order of plaintiff. •

Susquehanna Bank v. Loomis (85 N. Y. 207); Hall v. Fuller (5 B. & C. 750), distinguished, upon the ground that in the case at bar, there never was in existence a genuine instrument which could have justified the payment on plaintiff's account, on the day payment was made. White v. Continental Bank (64 N. Y. 319); Marine National Bank v. National City Bank (59 N. Y. 67); and National Bank of Commerce v. National Mechanics' Banking Ass. (55 N. Y. 211), distinguished, upon the ground that the rule there laid down obtains only between the acceptor and the person to whom the bill is paid.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 5, 1883.

• Appeal by plaintiff from judgment entered upon decision of a judge, trial by jury being waived.

The plaintiff was a depositor with defendant. One Morgan was plaintiff's bookkeeper, and had the key of the safe. On April 20, 1882, the plaintiff, intending to leave town, drew his check for \$700, dated April 22, 1882, payable to Morgan, and instructed Morgan, that if he, plaintiff, were not back by noon of Saturday, April 22, he, Morgan,

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should then take the check, go to the bank, draw the money, and give it to plaintiff's foreman, for the purpose of paying workmen. The check was left in plaintiff's check-book, which was placed in the safe. On the next day, April 21, Morgan took the check, altered it by erasure, so that the date read April 21, indorsed it, presented it to the defendant, who paid to Morgan the amount. Morgan absconded with the money. The bank charged the amount against the plaintiff in his account.

On April 24, the plaintiff went to the teller of the defendant, and, stating that he wished to arrest Morgan, asked the teller for the check, that it might be used in the prosecution. It was given to him, and he gave to the bank another paper on which was written the form of the altered check. The plaintiff took the altered check to a police magistrate, and as the basis of an application for a warrant, sworn to an affidavit that Morgan forged the check with intent to cheat and defraud the plaintiff, "and deponent was cheated and defrauded out of the said seven hundred dollars." The court below found that the check given to the bank was given only as a receipt or voucher to the bank for the altered check.

The question before the court was, whether the defendant could lawfully charge the amount paid by it to Morgan to the account of plaintiff. The judgment was for defendant, from which plaintiff appeals.

D. M. Porter, for appellant.—I. The alteration of the check from the 22 to the 21, by R. J. Morgan, was a material alteration, inasmuch as the check was wholly filled up in the plaintiff's handwriting, and the figure "2d" was erased and "1st" written in over the erasure, which erasure and alteration were visible and were made before the check had any inception (*Eastman v. Shaw*, 65 *N. Y.* 522; *Cowing v. Altman*, 71 *Id.* 435; *Marvin v. McCullum*, 20 *Johns.* 288; *Hall v. Wilson*, 16 *Barb.* 548). That is, no value was ever received by the plaintiff for it or any part of it; the alteration was a forgery, which made it utterly void

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before it was presented to the defendant for payment (*McGrath v. Clark*, 56 *N. Y.* 34). It was a forgery, because the change of date was a material alteration. "A check *post-dated* is not, like a bill of exchange, payable on a particular day: the only effect of its being post-dated is, that it is payable on demand on or after the day on which it purports to bear date" (*Mohawk Bank v. Broderick*, 10 *Wend.* 304; *S. C.*, 13 *Id.* 133; *Salter v. Burt*, 20 *Id.* 205). The payment, by a bank of a post-dated check before the day upon which it is dated, is a payment in its own wrong, and the money so paid remains to the credit of the drawer (*Godin v. Bank of Commonwealth*, 6 *Duer*, 76). "A note, bill or check may be ante-dated or post-dated, without affecting its legal character, as an obligation, but the date determines the time when it becomes payable (*Parsons v. North*, 13 *East*, 516; *Brewster v. McCardle*, 8 *Wend.* 478). The alteration was material and avoided the check (*Miller v. Gilleland*, 9 *Penn. St.* 119; *Kennedy v. Lancaster County Bank*, 18 *Id.* 347; *Bank v. Penick*, 5 *T. B. Monroe* [*Ky.*] 25; *United States Bank v. Russell*, 3 *Yeates* [*Pa.*] 391; *Henderson v. Wilson*, 6 *Howard* [7 *Miss.*] 65; *Hervey v. Harvey*, 15 *Maine*, 357; *Hocker v. Jamison*, 2 *Watts & Sergt.* [*Pa.*] 438; *Humphreys v. Guillow*, 13 *N. H.* 385; *Chitty on Bills*, 12 Am. ed. from London 9th ed. 208, 209 (182*); *Shepherd's Touchstone*, 68; *Master v. Miller*, *Smith's L. C.* part 2, 7th Am. ed. 1254; *S. C.*, 4 *T. R.* 320; *S. C.*, 5 *Id.* 367; *S. C.*, 2 *H. Black*, 141; *Outhwaite v. Luntley*, 4 *Campbell*, 179 [180]; *Hall v. Fuller*, 5 *B. & C.* 750 [757]; *Adair v. Sanderson*, 14 *Rep.* 144 [Supr. Ct. of Iowa, April, 1882]; *Wood v. Steele*, 6 *Wall.* 80; *Suffell v. Governor & Co., Bank of England*, 47 *L. T. R. N. S.* 146; *S. C.*, 26 *Alb. L. J.* 406; *Bruce v. Westcott*, 3 *Barb.* 374). It is the banker's duty to see that the check is genuine in all respects (*Smith v. Mercer*, 6 *Taunt.* 76).

II. The plaintiff was not negligent. The check was complete, and no change could be made without erasing a part of it, and plaintiff had no reason to believe such a crime could be committed, and was not bound to presume it (*Leh-*

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man v. Central R. R. & B. Co., U. S. Circuit Ct. M. D. Alabama, June, 1882, MSS. ; Baxendale v. Bennett, note to Knoxville Bank v. Clark, 33 *Am. Rep.* 137 ; Bank of Ireland v. Evan's Charities, 5 *House of Lords Cases* [Clark] 389).

John C. Shaw, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—My opinion is that the judgment appealed from should be reversed.

The plaintiff having deposited money with the defendant, the latter was authorized to pay out on account of plaintiff the amount deposited as ordered by plaintiff's checks. This relation of the parties involved obligations of the kind that rest upon contract, and it was the contract of the defendant that it would not charge the plaintiff with the amount of a payment made upon a check that was not drawn by plaintiff. Therefore, the inquiry in this case is, was the amount in controversy, that the defendant charged to plaintiff, paid upon a check drawn by plaintiff.

The plaintiff had drawn an instrument in the form of a check upon the defendant, for \$700, and as of the date of April 22, 1882. After giving attention to what, as matter of law, is identity of choses in action, it is clearly seen to be the fact that the instrument referred to was never presented to the bank for payment.

Morgan, who was named as payee in it, changed April 22, on the paper, to April 21. Beyond controversy, this was a material alteration. The effect was that from the time of the alteration the instrument ceased to be the act of the plaintiff and was void against him. When the defendant, after paying the amount written in it to Morgan, charged the sum to the plaintiff, as the payment was not made upon the order of the plaintiff, the charge was not justified by the contract between the parties.

As a part of the argument of the learned counsel for respondents, it was urged that the defendant was bound to know only the signature upon the check. The leading case of *Hall v. Fuller* (5 *Barn. & Cress.* 750), is that the banker

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is bound to ascertain that the check is genuine in all respects. Bankers cannot charge checks paid by them that have been forged as to their amounts, or to holders that claim through a forged indorsement of the payee. The principle of this is that, the money was not paid upon the depositor's order. The instance of a date being changed is not an exception to the rule. When the date is forged, the instrument ceases to be order of the depositor. In this respect checks are like notes and bills. The well-known text of Chitty on Bills (181) is: "If a bill of exchange or promissory note be altered without the consent of the parties in any material part, as in the date, sum, or time when payable, or consideration, or place of payment, such alteration at common law, and independently of the stamp acts, renders the bill or note wholly invalid, as against any party not consenting to such alteration, and this although it be in the hands of an innocent holder," citing the leading case of *Marler v. Miller* (4 *T. R.* 320; 1 *Smith's L. C.*).

It was also argued that the bank is entitled to charge it against the account of the maker, for the correct amount, and at the true time he made it payable. This implies, as I understand, that the bank had a right to keep the check, as it did in fact, until the day of the true date, and then to charge its amount against plaintiff's account. This does not appear to me to be correct in principle, or to regard the nature of the transaction.

The check, if unaltered, could not legally be paid out of the funds of the plaintiff, on presentation for such payment before the true day, of April 22 (*Godin v. Bank of Commonwealth*, 6 *Duer*, 76). Any one acquiring the check before that day would have, in the implied obligation of the drawing of the check, a promise of the drawer that the bank would pay upon presentation, on or after the date of April 22. The bank on which it was drawn, that is, the present defendant, would have no further right. If the bank had cashed the check, unaltered, but on April 21, and on that day the whole of the account had been assigned, or paid out, so that the bank had been driven to an action

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upon the check, of course it would recover judgment. But the check being forged as to its date, the answer of the plaintiff, that the check was void as to him, that is, that it was not his check, must have prevailed. The defendant by keeping the forged check one day could not transform the promissory instrument that was invalid to bind the plaintiff to see that the check was paid upon demand, into an instrument valid to justify such a payment upon demand.

Some cases were cited to support the propositions advanced for the respondent. For instance, in *Susquehanna Bank v. Loomis* (85 *N. Y.* 207), DANFORTH, J., says: "It must be conceded that the Plainfield Bank was at least entitled to have refunded to it the difference between the true sum for which the draft was drawn, and that to which the check had been altered. The Plainfield Bank was the drawer of the draft, and the citation says in effect, that it could not be charged by the drawee with the amount of the draft to the extent that it had been increased above the amount which was originally and justly due upon it." This, it may be here said, is the opposite of asserting that against its depositor the bank is only bound to look to the genuineness of his signature upon the check. The citation may imply, in connection with the further citation of *Hall v. Fuller* (5 *B. & C.* 750), that the Plainfield Bank could properly be charged with the genuine amount of the draft before it was feloniously increased. And *Hall v. Fuller* did so hold. In both cases it was either the fact or was considered to be the fact, that at some time previous to his payment upon the forged instrument, there had been issued by the drawer to the payee a genuine instrument, which would have authorized the payment of the genuine amount by the drawee. Under the circumstances, it was in effect held, that although of course, the genuine instrument was destroyed, nevertheless the obligations and rights under it passed by the transaction. Strictly, of course, the forged instrument was a nullity as to any obligation upon itself, and could not transfer rights under a genuine instrument. In favor of an innocent party, it might legally be evidence

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of a circumstance which was relevant to the rights and devolution of rights under the genuine instrument. When, physically, the forged instrument was the same as the genuine instrument, excepting the alteration of some words or figures, it would be difficult to describe the transaction concisely, unless by referring to the payment of the amount of the genuine instrument as being made upon the forged instrument. Such a description of the facts would not be meant to assert the validity of the forged instrument in any respect. The law justified the payment to the less amount, as made under rights springing from a genuine instrument that had been destroyed, which if not destroyed but presented at the time of the actual payment, would have been effectual against the drawer.

In the present case, at the time of the actual payment, there was not and never had been in existence a genuine instrument which would have justified any payment out of plaintiff's credit, with defendant (*Godin v. Bank of Commonwealth, supra*). The defendant would have bought a past dated check if it had not been altered. It having been altered, they must abide the consequences appropriate to the fact, that they bought a forged chose in action. If they should be allowed to charge its amount against the plaintiff, because they had the power of keeping it until the next day, and then using the forgery, instead of treating it as void, they would at least, use a power that belonged solely to the plaintiff as drawer of creating a genuine instrument to bind him.

It may be argued that, if after altering it, Morgan had presented it on the 22, the defendant would have had a right to charge its amount to plaintiff. The proposition presents on the probable speculation that Morgan would forge, with no object. But, I do not assent to an inference, that the present case is like the hypothesis. The fact that it was altered and presented before the day of its true date has significance in favor of the plaintiff. The plaintiff, by making the day of presentation the 22, secured, except as against forgery, that perhaps he might be at home and pre-

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vent the necessity of Morgan using the check, or that Morgan would not use it until a time when there would exist the strongest probability that the proceeds could not be misapplied. The foreman would be looking for the money on that day, and would arrange with Morgan, when and where to receive it. The testimony of the foreman and his brother in this case, illustrates this. The earlier payment of the check asserted, unintentionally, Morgan's fraud, and deprived the plaintiff of the benefit of those circumstances that would have tended to prevent Morgan's attempting to defraud on the 22, of this the defendant took the risk (*Cowing v. Altman*, 71 *N. Y.* 442).

In *White v. Continental Bank* (64 *N. Y.* 317), the plaintiff was the drawee of a sight draft, its amount was unlawfully increased, and it was then presented to the plaintiff, who accepted it and afterwards paid the increased amount upon it to the defendant. The action was to recover back the money. When, therefore, the court said that "the plaintiffs as drawees of the bill, were only held to a knowledge of the signature of their correspondents as drawers; by accepting and paying the bill, they only vouched for the genuineness of such signatures, and were not held to a knowledge of the want of genuineness of any other part of the instrument, or of any other names appearing thereon, it gave the rule of obligation, between the acceptor, and the person to whom the bill was paid. It does not touch the obligation between the drawee as acceptor and the drawer. The second rule of the case contains something pertinent to that, and relevant here, when looking upon the defendant as a holder of the check on the 21, seeking to charge it on the 22. If as against the drawer, the drawee was held only to ascertain the genuineness of the signature, there would be no reason why, if the drawee paid, he could not be authorized to charge the drawer, and then, why he should be allowed to recover the amount over again, from the person to whom the acceptance was paid. The same distinction exists in the cases of *Marine National Bank v. National City Bank* (59 *N. Y.* 67); *National Bank of Commerce v.*

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National Mechanics' Banking Association of N. Y. (55 *N. Y.* 211).

I am of opinion, therefore, that the plaintiff should have had judgment on the case as presented, unless it appeared that the plaintiff was guilty of such laches in respect of the forgery, that he should suffer rather than the defendant. The plaintiff so wrote the date of April 22, that the forgery was accomplished by erasing the second figure. The figure 1 that was placed instead of the erased figure, was not written in a blank space, which a person to whom the check might be presented, would have a right to believe would be filled up by the maker when drawing the instrument, or by his authority afterwards. The circumstances presented to the plaintiff and to the defendant, the same consideration that would apply to the erasure of the amount of a genuine check. The plaintiff gave no facility for the accomplishment of the forgery. The trust he placed in the forger led to the forgery or caused or aided it, in no other sense than that it was one circumstance of the many that must exist to render the crime possible. It is usual to have employees, and usual to believe that they will not forge. The fact that he made the check to the order of his clerk was an act of prudence rather than of negligence, in respect of the course the check might take in general. But he was not bound to entertain the likelihood of such a forgery as did take place. No one would think of it as being likely to be perpetrated. The general honesty of men, and the improbability of dishonesty of the clerk in such a respect, the restraints of conscience, and of the penal laws, would prevent a business man entertaining the idea that such a forgery was probable if it came into his mind casually.

I am therefore of the opinion, that the amount of the check should not have been charged against the plaintiff.

On the findings of the court below, I also think that the plaintiff's action in taking the custody of the check for the purpose of prosecuting Morgan, did not ratify the alteration or the charge or estop him from bringing this action.

Judgment should be reversed and a new trial ordered,

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with the costs of the appeal to the appellant to abide the event.

TRUAX and O'GORMAN, JJ., concurred.

THE CAMERON COAL CO., APPELLANT, v. JOHN H.
EMANUEL, RESPONDENT.

*Specific performance of contract to receive stock for bonds, when not decreed.
—Evidence.*

The aid of the court to enforce specific performance of a contract is not a matter of right, but rests always within the judicial discretion of the court, guided by the rules of equity as applied to the circumstances of each particular case, and it will not be granted when it will produce hardship or injustice to either of the parties.

In an equitable action of such a nature the court should receive all parol evidence which may be offered to show mistake or fraud, whereby the written contract fails to express the actual agreement, and to prove the modifications necessary to be made therein, either as limiting the scope of the instrument or enlarging it.

Accordingly, where defendant as executor, owned bonds of a certain company, and together with other bondholders, agreed in writing for a consideration, to surrender the same and receive in return stock of a new company to be formed under a scheme of re-organization, said bonds being then and at the time of bringing this suit, held by a third person as security for a claim against defendant's intestate, the amount of which claim was disputed by defendant and was in issue between the parties, and defendant having demanded the return of said bonds, which was refused, etc.,—of all which facts as appear from letters and conversations in evidence, plaintiff (the company) was aware, and it was understood orally between plaintiff and defendant at the time of the execution of the instrument, that present delivery was waived till defendant should obtain possession of the bond, and that the execution of the contract by defendant was conditional,—*Held*, that specific performance should not be decreed.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 5, 1883.

Appeal from a judgment dismissing the plaintiff's complaint on the merits.

Opinion of the Court, by O'GORMAN, J.

Action for specific performance.

Certain conversations and letters were received in evidence "against plaintiff's objection and exception," tending to show that the execution of the contract in suit by defendant was understood to be conditional, etc., and also tending to show knowledge by defendant that the bonds referred to in the contract were owned by defendant, as executor, and were at the time of the execution of the contract and when this suit was brought, held by a third person as security for a claim against defendant's intestate.

Further facts appear in the opinion.

Simpson & Warner and *A. J. Vanderpoel*, for appellant.—1. It is only in case of reformation that explanatory parol evidence can be received. Reformation can only be had, however, where every party in interest is before the court (*Smith v. Howard*, 20 *How.* 151). That the co-contractors were influenced by the fact of the defendant's signature is clear, for it appears that the transaction was only to be consummated upon all the bondholders contracting to give up all of their bonds, aggregating the entire issue of \$250,000. Defendant cannot shield himself from performance by showing a verbal understanding between plaintiff and himself existing at the time of the signature and undisclosed to his co-bondholders who signed. It would be placing a premium upon fraud (*Breck v. Cole*, 4 *Sandf.* 79; *Harloe v. Foster*, 53 *N. Y.* 385). Again, the defendant is estopped by the declarations subscribed by him (*Breck v. Cole*, 4 *Sandf.* 79; *Jackson v. Parkhurst*, 9 *Wend.* 209). He is in consecutive order the sixteenth person to sign this absolute and unqualified statement, and upon the strength of his and the other fifteen signatures preceding, twelve more bondholders were induced to join, thus apparently getting in all the bonds.

Chambers, Boughton & Prentiss, for respondent.

BY THE COURT.—O'GORMAN, J.—The action was to compel a specific performance by the defendant of his written

Opinion of the Court, by O'GORMAN, J.

contract to surrender a certain bond of the Cameron Coal Company as in said contract provided. The contract is as follows: "In consideration of the services rendered, and to be rendered by Solomon L. Simpson, in the reorganization and improvement of the Cameron Coal Company, of Cameron, Pa., we, the undersigned bondholders of said Cameron Coal Company, hereby agree with said Solomon L. Simpson, and with each other, to surrender to said company, to be canceled, the number of bonds of said company set opposite our names respectively, and hereby consent to the satisfaction and cancellation of the mortgage securing the same, and agree to receive in place thereof, and in full payment therefor, stock of the said company as reorganized, of the par value of \$50 per share equal in amount to bonds held and surrendered by us as aforesaid; and we hereby deliver said bonds to said Simpson and authorize him to make the cancellation and exchange aforesaid." This contract was signed by twenty-eight persons and firms, the defendant being the sixteenth on the list and signing for a bond of \$1,000 in amount.

It appears by the findings of the trial judge that the defendant had not either when he signed this contract or at any time since then, this bond in his possession or under his control, but that it was then a part of the estate of defendant's deceased father, of which estate he was the executor, and that the bond was in actual possession of one Henry Hart, who had received it from defendant's testator as collateral security for an alleged indebtedness of him to said Hart, and that the amount of that indebtedness was disputed by the defendant as said executor, and is now a question at issue between said Hart and him.

It also appears in evidence and the trial judge so found, that at the time of the signing of this agreement by defendant, the present delivery of the bond was waived and it was understood between plaintiff and defendant that the execution and delivery thereof to plaintiff was conditional, and that the same was not to be considered to be executed or delivered or in force against defendant until he should

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have obtained possession of the bond from said Hart. The trial judge also found that defendant had repeatedly requested said Hart before the commencement of this action to deliver up said bond to the plaintiff to be exchanged on the terms stated in said agreement, but said Hart refused so to do, unless said disputed claim was first paid. The trial judge also found as matter of fact that the defendant prior to the commencement of the action was and ever since has been unable to deliver the bond in suit to the plaintiff, and that such inability arose from no fault of the defendant.

We see no reason to differ from the learned trial judge in his findings of fact.

There was some conflict of testimony between the witnesses for the plaintiff and the defendant, which it was within his province to adjust and reconcile, or to decide thereon according to what was, in his judgment, the weight of evidence. The question remains, whether, on such a state of facts, the plaintiff is entitled to the relief claimed in this action.

The aid of the court to enforce specific performance of a contract is not a matter of right, but is always within the judicial discretion of the court, guided by the rules of equity as applied to the circumstances of each particular case. It will not be granted when it will produce hardship or injustice to either of the parties (*Willard v. Taylor*, 8 *Wall.* 565-567).

In the case at bar, the trial judge found as a matter of fact that the plaintiff was aware before the commencement of the action that the bond was not owned by defendant personally, but was the property of the estate of which he was executor. The defendant, as executor, is unable to perform this contract or to obtain possession of the bond until the dispute as to the amount legally due by his father's estate to said Hart has been determined, and the object of this action is to compel the defendant to do forthwith an act, which it is impossible for him to perform.

Statement of the Case.

To require of him now as executor to procure delivery of the bond to himself by payment of any greater sum than is legally due to said Hart by the estate, would be manifestly unjust to the estate, and to compel defendant to procure the bond by paying out of his own pocket a sum of money not legally due to said Hart, would be a manifest injustice to defendant personally.

The exceptions to the admissibility of certain letters and of parol evidence were properly overruled by the trial judge. In an equitable action of this nature the court is justified in receiving all evidence which may be offered to show mistake or fraud, whereby the written contract fails to express the actual agreement, and to prove the modifications necessary to be made therein either in limiting the scope of the writing, or in enlarging it (*Abbott's Trial Ev.* 730 ; *Beardsley v. Duntley*, 69 *N. Y.* 580 ; *Briggs v. Partidge*, 64 *N. Y.* 360).

The judgment of special term should be affirmed, with costs.

SEDGWICK, Ch. J., and TRUAX, J., concurred.

THOMAS FLYNN, RESPONDENT, v. THE CENTRAL PARK, &c., R. R. CO., APPELLANT.

Negligence—liability of master for acts of servants.—Street railroad companies.

Irrespective of the regulations of the company, the conductor of a street railroad car has a right and a duty, within the scope of his authority, to put off a passenger, even after his fare is paid, if he becomes disorderly or offensive.

Though the act of an employee be flagrant, reckless and illegal, still if it is within the scope of his authority and employment, and his authority is not used merely for an independent and wrongful purpose of his own, the employer is liable therefor.

Accordingly, where the conductor of a street railroad car and a passenger had a long altercation, in which the passenger was angry and excited and used abusive and insulting language to the conductor, and finally coming

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out on the back platform to see where he was, said to the conductor, "I'll fix you in the morning. I will go right up to the depot and report you. I am not going to lose twenty cents by you," whereupon the conductor, without stopping the car, which was moving fast, shoved defendant off the car, whereby he was injured, etc. *Held*, that the case was properly submitted to the jury, and that a verdict for plaintiff should not be disturbed.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 5, 1883.

Appeal by defendant from judgment in favor of plaintiff entered upon verdict and from order denying motion for a new trial made upon the judge's minutes.

The facts and exceptions appear in the opinion.

Almon Goodwin, for appellant.

Abel E. Blackmar, for respondent.

BY THE COURT.—O'GORMAN, J.—The evidence, regarding it in the light most favorable to the plaintiff, showed that on the evening of February 6, 1880, he was returning from his day's work at the corner of Fifty-seventh street and Tenth avenue to his home in East Thirty-first street, and got on one of the defendant's cars which was going east. It was then a little after seven o'clock and dark. He had knocked off work at half-past five that evening, and after he left the factory he had gone to a beer saloon where he had drunk two or three glasses of beer with friends whom he met there. Soon after getting on the car, an active and angry altercation arose between him and the conductor of the car as to the money handed by him to the conductor in payment of his fare; the plaintiff saying that he had given the conductor twenty-five cents and demanded twenty cents change, and the conductor contradicting him and saying that plaintiff gave him only five cents. In the course of the dispute, plaintiff charged the conductor with the intention to pocket his—plaintiff's—money and beat him out of it, and used toward the conductor abusive and insulting language and was angry and excited. Plaintiff followed the conductor, and was told by him to take his

seat and keep quiet. When the car reached to between Forty-third and Forty-fourth streets and First avenue, plaintiff went out on the rear platform to see where he was; when he got out he said again to the conductor, "I will fix you in the morning. I will go right up to the depot and report you. I am not going to lose twenty cents by you." As plaintiff turned on the rear platform the conductor shoved him off the car, and he fell in the snow which lay on the avenue, and received severe injury. The car was then moving fast and did not stop. The evidence sufficiently shows that plaintiff was angry, excited, violent and abusive; that his conduct attracted the attention of the passengers and was unruly and disorderly.

At the close of the testimony on behalf of the plaintiff, defendant's counsel moved the court for dismissal of the complaint on the grounds—First: That no cause of action had been made out against the defendant. Second: That it affirmatively appeared by the plaintiff's evidence that the conductor had been guilty of a willful assault on the plaintiff not in the course of his duty. The trial judge denied the motion, and the chief question now is, whether he erred in so doing.

No evidence was given in this case as to any regulations of the defendant corporation specifying the duties of their conductors, but it seems to have been conceded on both sides on the trial and argument of this case that the conductor had the right to put off a passenger even after paying his fare, if he became disorderly or offensive, and not only possessed the right, but the exercise of that right under certain conditions became a duty he owed to the other passengers. The trial judge so charged in effect, and no exception was taken to his charge in that respect, and it may be taken for the purposes of this contention as expressing the true rule of law,—and if the conductor in the exercise of such right and acting for the purposes and within the scope of his employment and authority, exceeds or abuses his powers to the injury of any one, in that case,

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the master-carrier—by whom the conductor has been employed is legally responsible for the injury.

But if the conductor, although acting within the scope of his employment and authority, but without regard to his service to his employer and not for the purpose of performing any duty that he as agent or representative of his employer, was bound to perform, but from malice and in order to effect some purpose of his own, foreign to the employment, wantonly commits an assault upon or causes damage to another—in that case the act is not the act of the master, but the act of the servant only, and the master is not liable for it (*Rounds v. R. R.*, 64 *N. Y.* 136; *Mott v. Consumers' Ice Co.*, 73 *Id.* 547; *Hoffman v. N. Y. Cent. & Hudson River R. R. Co.*, 87 *Id.* 31).

Hoffman v. N. Y. Central & H. R. R. Co. (*supra*) is a strong case on this subject. A boy of nine years of age jumped on the steps of a passenger train passing along the street of this city and sat down on the platform of the car. The conductor while the train was in rapid motion kicked the boy from the car. The court of appeals held: "No doubt the kicking of the boy off the car, was not only a wrong to the plaintiff, but was a violation of the duty which the train servants owed to the defendant, to exercise proper care in executing the authority confided to them; but in most cases, where the master has been held liable for the acts of a servant, the tortious act was a breach of the servant's duty. In this case, the authority to remove the plaintiff from the car was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it. For this the defendant is responsible, unless the brakeman used his authority as a mere cover of accomplishing an independent and wrongful purpose of his own."

The evidence before the court when the case of the plaintiff in the case at bar had closed, would not warrant the trial judge in holding as matter of law, that the conductor in ejecting the man from the car was acting only from malice to accomplish his own private ends, irrespective of

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the duty he owed the company, defendant. The act may have been flagrant, reckless and illegal, still, if it was within the scope of his employment and authority, and his authority was not used merely for an independent and wrongful purpose of his own, the defendant, his employer, was liable.

The trial judge could not have decided this question as a matter of law. It was a question of fact for the jury on the evidence, and was properly submitted to them.

At the close of the whole case, the defendant's counsel requested the court to charge the jury that they should render a verdict for the defendant, which request was denied. Defendant's counsel also excepted to that part of the charge which stated that "if the conductor was acting in the scope of his employment, but exceeded his duty, the defendant was responsible," on the theory that there was no question to go to the jury. I can see no error in either of these rulings. .

Evidence was before the jury, which warranted them in finding that the plaintiff, being violent, offensive, boisterous, unruly and disagreeable to the other passengers in the car, was, by the conductor, violently shoved off the car, while the same was in quick motion, and severely injured thereby.

The question of the credibility of the testimony, and the comparative weight to be attached to it, was wholly for the jury, and their decision thereon should not be disturbed.

Judgment affirmed with costs, and order appealed from affirmed, with \$10 costs.

SEDGWICK, Ch. J., and TRUAX, J., concurred.

Opinion per Curiam.

THOMAS STILLMAN, RESPONDENT, v. MARY S. VAN
BEUREN, IMPEADED, ETC., ET AL., APPELLANT.

*Mortgage of lease—interest of lessor in rents from sub-leases—decree in
foreclosure.—Interest—on amount payable from trust fund.*

Appellant, the owner of certain premises, leased the same, and her lessee thereafter sub-let the premises and mortgaged the original lease. The parties entitled to the rents under the sub-leases assigned them to trustees for distribution in certain ways, and in an action to foreclose said mortgage such trustees were made receivers, to hold the rents, etc., subject to the judgment of the court.

Held, in said action that appellant (the original lessor), was not entitled to a direction in the judgment that such receivers pay to her out of the fund the whole amount of her rent in arrear; that she had no lien upon such fund for rent due her, except as given by special agreement with the parties entitled to the rents under the sub-leases. But, *it seems*, that the judgment should have contained a direction that said arrears be paid out of the proceeds of the sale under the judgment; this, as a protection against the exercise of appellant's right of ending the term for non-payment of rent, etc.

Where the said trustees were directed by the assignment to apply the rents received by them from the sub-leases to the payment of the rent due appellant on the original lease, and provided that "only \$1,500" per annum should be so applied.

Held, that appellant was not entitled to interest on said \$1,500, as if it were a debt due on an independent obligation; that it was to be considered part of a fund.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 5, 1883.

Appeal by a defendant in an action for foreclosure of a mortgage, from certain provisions in the judgment of sale, etc.

The facts are stated in the opinion.

Edward Mitchell, for appellant.

David Thurston and Henry R. Beekman, for respondent.

PER CURIAM.—The mortgage was of a lease made by the appellant, the owner of the fee. Her lessee had sub-let.

Opinion per Curiam.

Parties entitled to the rents under the sub-leases, had assigned them to trustees for distribution in certain ways. One of the trusts was to pay the rents due, or to become due, to the appellant, but not to a greater amount than \$1500, in each year. The trustees had been appointed receivers in this action to hold the rents collected by them, subject to the judgment of the court. On the trial, the appellant claimed that the judgment should direct that the receiver should pay to her a certain part of the fund in their hands, above the amount of \$1,500, provided by the agreement, on the ground that she was entitled thereto, on account of rent alleged to be in arrear, after the \$1,500 were paid. The appellant failed to show that she was entitled to any part of the fund formed of rents collected under the sub-lease, except so far as the assignment provided. She could get an interest in those rents, under the facts of this case, only by voluntary transfer by the person to whom they were legally due. No transfer has been made except as to the \$1,500. It may, perhaps, be assumed, although it was not shown, that there were arrears. The amount in arrear was not proven. The fundamental difficulty is, she had no title to, or lien upon rents paid under the sub-lease.

It was also argued that the judgment should have provided that the rent in arrear should be paid out of the proceeds of the sale under the judgment. It may be granted, so far as this appeal is concerned, that plaintiff might have required the insertion of such a provision (*Catlin v. Grissler*, 57 *N. Y.* 364); that would not have been justified by any right, the appellant would have to be paid out of the proceeds, but, by such payment being a protection against the exercise of the right the appellant would have of ending the term, subject to statute provisions, by dispossessing the lessees and those holding under them, because of non-payment of rent due. The appellant could not claim a right to payment of rent in that particular way. Her rights were confined to enforcing personal obligations to pay rent, and to ejectment for non-payment of rent.

The judgment should be affirmed, with costs.

Opinion per Curiam.

Appeal in the same action, by the receivers from an order specifying the amount of money that was in their hands, subject to the order of the court, after distribution of the amounts provided to be distributed by the assignment referred to in the decision of the last appeal.

The assignment provided for distribution to different persons. The clause of the assignment relating to said rents, was as follows :

“They (the trustees), shall apply the rents thereafter received (from sub-leases) to the extinguishment of the amount in arrear, or which may at any time be in arrear, for rent, taxes, Croton or assessments, under lease to said Christian F. Dickel (the lessee under the original lease), until there are no arrears of rent due the party of the second part hereto (the appellant) under the lease from her to said C. F. Dickel, and until there are no arrears of taxes, assessments or Croton on said premises. It being agreed, however, that \$1,500 per annum only, from and after April 1, 1877, shall be applied from the rents to be received by the parties of the first part to the payment of and on account of the rent thereafter to grow due to the party of the second part under said lease to Christian F. Dickel.”

PER CURIAM.—The receivers took subject to the provisions of the assignment of the rents under the sub-leases. The claim is, that the appellant in the last appeal was entitled, under the assignment, to interest from the time the rent to her fell due to time of payment by the trustees, although that would require the payment of more than \$1,500 under the assignment. It was not the intent of the trust that the \$1,500 should bear interest as if it were a debt due on an independent obligation. It was considered a part of a fund. Perhaps, if after the fund should have paid the \$1,500, there was no payment, and the fund earned interest, a proper portion of earnings might belong to the \$1,500. No claim of that kind is made on the appeal.

The order should be affirmed, with \$10 costs.

Statement of the Case.

ALBERT PALMER CO., RESPONDENT, v. EDWARD VAN ORDEN, APPELLANT.

*Lien of attorney for compensation—how affected by settlement between clients.
—Motion to open default.*

Before the time to answer had expired, the parties hereto settled the cause of action for \$50, without the intervention of their attorneys. Plaintiff's attorneys claiming their compensation by agreement, to be the taxable costs and the amount of the recovery on the cause of action above \$50, after the time to answer had expired, forthwith entered judgment for default of answer, for the full amount of the claim (\$87.50) besides interest and costs, and credited the \$50 as a payment thereon. It did not appear that defendant had notice of the lien of plaintiff's attorneys, nor was the good faith of the settlement impeached.

On an appeal from an order denying a motion to open the default, the proposed defense being the settlement,—*Held*, that plaintiff's attorneys were not irregular in proceeding to judgment in the enforcement of their lien upon the costs; but that they had no authority to enter judgment for the full amount claimed, crediting the \$50 as a payment on account; and that the lien was upon the actual, not the alleged cause of action, and the attorneys could not claim the right to proceed with the action for the purpose of enforcing such asserted lien upon the cause of action, by showing the amount due to be greater than the parties had fixed it by their settlement.

Upon a motion to open a default for failure to answer, strict practice requires that a copy of the proposed answer be served with the moving papers, but upon appeal it will be held sufficient if the papers, including the order to show cause, show upon their face the nature of the proposed defense, and that it is good and sufficient; *e. g.*, a settlement between the parties before the expiration of the time to answer.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 19, 1883.

Appeal by defendant from order denying motion to open judgment entered for want of answer.

The action was to recover the sum of \$87.50 upon contract. Before the time to answer had expired, the parties, without the intervention of the attorneys, made a settlement, by which the defendant paid to the plaintiff the sum of \$50, in satisfaction of the claim made in the complaint. It did not appear conclusively that this settlement included

Appellant's Points.

the costs of the action. No answer was served, and for want of answer, the plaintiff entered judgment for the \$87.20, \$11.19 interest thereon, and \$18.58 costs; in all for \$117.27. After entry of judgment, its satisfaction to the extent of \$50 was made by plaintiff, as if the \$50 had been paid on account.

The defendant moved to set aside judgment and for leave to serve answer on the ground of the settlement.

The plaintiff's attorneys claimed, that they and plaintiff had agreed, before action begun that their compensation was to be the taxable costs and the amount of the recovery above \$50, and that they had a lien upon the cause of action and the judgment in the amount of the judgment after the application of the \$50, citing section 66, Code of Civil Procedure. It did not appear that defendant had notice of the lien of plaintiff's attorneys, nor that plaintiffs before entering judgment on defendant's default, and after settlement, applied to the court for leave to enter said judgment.

Further facts appear in the opinion.

H. B. Whitbeck, for appellant.—The parties had a right to make the settlement, regardless of plaintiff's attorneys; its good faith was not impeached (*Goddard v. Teenbath*, 24 *Hun*, 182; *Sullivan v. O'Keefe*, 53 *How. Pr.* 426). The plaintiff's attorneys were irregular; they had no right to proceed with action after the settlement (of which they had knowledge) without first obtaining leave from the court to continue the action (*Goddard v. Teenbath*, 24 *Hun*, 182). Plaintiff's attorneys knew defendant intended to settle claim, and gave extension of time to answer to enable him to settle, yet failed to give notice of lien (if they had one) before settlement or judgment, and therefore cannot sustain their present claim (10 *Abb. N. C.* 392). "To secure the lien before judgment, there must be either notice or a fraudulent or collusive settlement." The amended Code, "§ 66," does not dispense with the necessity of notice, etc. Compensation may be governed by agreement, but a careful reading of the section shows that, although a lien may exist

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for a special agreement, it cannot be secured before judgment without notice. The necessity of this is obvious, otherwise a defendant would be entirely at the mercy of the plaintiff and his attorney.

Dill & Chandler, for respondents.

BY THE COURT.—SEDGWICK, Ch. J.—On the affidavits below, the defendant was not entitled to a finding that the settlement made between the parties embraced the costs of the action as well as the cause of action. The plaintiff disputed that it did, and the affidavits seem to show that the costs of the action were not regarded by either party. I do not perceive that under the facts of the case, especially the character of the settlement, the plaintiff's attorney was bound to stay proceedings in the action or to discontinue without costs. The defendant, in order to prevent the consequences of not serving an answer, should have served one, setting up such defense as might be made. If he chose to rely upon the compromise, and not upon a denial of any indebtedness, such a defense would involve the defendant being responsible for the costs of the action up to the time of settlement, at least, unless he alleged and proved that the compromise included the costs.

The plaintiff not being irregular in entering judgment, for default of answer, on the motion to open the default and allow defendant to plead, there were at least two questions. One was, to what extent did the defendant show that he had a defense to the action? The other was, on what terms should he be allowed to defend?

Under the first question, the defendant was bound to show affirmatively what his defense was. Strictly, he should have served with his motion papers a copy of the proposed answer. He presented an affidavit of merits in the usual form, and his attorney also made affidavit as to a good and substantial defense upon the merits. As matter of practice, this by itself would not have been sufficiently specific. And if nothing more had been shown as to a defense, it would have required a denial of the motion. The

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papers in other parts show, however, what was the defense intended, and the order to show cause stated as ground for the relief asked, "that the claim upon which this action was founded had been paid and settled in full prior to the entry of said judgment." It has been already said, that the defense, properly pleaded, would not have been a bar to the action, from the time of its beginning but to the continuance of the action, after the settlement, and would involve the defendant's paying the costs to the time of settlement. If, therefore, the judgment had been only for \$50, the amount of the settlement and the costs of the action, with a satisfaction as to the amount of the \$50, the defendant would not have been entitled to relief, and the motion would have been properly denied, with \$10 costs. In that event, it would not have been necessary to determine what terms should be imposed upon the defendant as a condition of opening a judgment that had been regularly taken.

The papers for plaintiff show that they did compromise the claim made in the complaint for the \$50, which the defendant paid, and that their attorney knew that a settlement had been made, so far as the claim was concerned. The plaintiff's attorneys wrote a letter to defendant's attorney, saying that they understood that some money had been paid for a settlement, but that, as it was made without their knowledge, "we shall not ratify the settlement, unless our costs are paid and our lien discharged." A letter of the plaintiff admits impliedly the settlement of the claim, but asserts that in making it nothing was said about the suit, and ended, we "prefer that you enforce your lien for the costs and services in the case against the subject matter of the action." An affidavit of one of the attorneys for plaintiff says "that plaintiff's attorneys have a lien upon the judgment entered in this action for \$67.27, being the amount of their services, which were to be and are whatever amount was recovered over \$50 and the taxable costs; that the said lien is wholly unpaid and wholly unsatisfied, and the plaintiff refuses to pay the same, and the validity thereof depends upon the judgment entered herein which stands of

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record to the amount of said lien only." This seems to be hardly more than a statement of certain conclusions of the affiant, and not to contain a statement of facts as to any agreement between the parties as to the compensation of the attorneys. The judge below would have been justified in holding that the plaintiff's attorney did not show that there had been an express agreement as to compensation. If, however, it be taken that there is enough to show that there was an agreement that the attorney should have, as compensation, the taxable costs and whatever amount beyond \$50 might be recovered, the practical result, in my judgment, should be the same.

Under the notion that the attorneys held under section 66 of the Code of Civil Procedure, a lien, for the amount of their compensation, of the kind indicated, upon the cause of action, which attached to the judgment when entered, they proceeded to enter judgment for the whole amount claimed in the complaint, of \$87.50, and as interest \$11.19, and \$18.58 as costs and disbursements. They afterwards satisfied this to the extent of \$50, calling it in the satisfaction-piece "part payment" of the judgment. It has been noticed that the plaintiff's attorneys do not deny that as between the parties to the action, the cause of action has been definitely settled. The only fact to the contrary is that the attorneys chose to apply the \$50 to the judgment as if it were a payment on account. They had no authority to make this use of the amount. This error will not affect the result. The attorneys claim that although there was this sufficient and valid compromise, nevertheless, as they had a lien, they can prosecute the action on its original merits disregarding the compromise.

It will not be necessary to give a full construction of section 66, for, in my judgment, it is not necessary to go farther than to say, that the lien is upon the actual cause of action and not upon the alleged cause of action. A cause of action exists and has its validity without its being stated in a pleading. What proof is there here that the cause of action which the plaintiffs had is other than a legal right to

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recover \$50? I do not see anything to show that plaintiffs were entitled to recover more than this amount. This has to be shown as against the defendant. Against him, the complaint does not prove it. Nor does his default of an answer prove it, in view of the facts shown, which include the settlement. The plaintiff's attorneys claim the power to proceed with the action, irrespective of the otherwise manifest right of the plaintiff to agree to a compromise, and this power is claimed because the attorneys assert a lien. Assume that the parties had no right to agree that the amount due was less than in fact it was, the attorneys must show that the amount was less. There is no proof of this. In truth, the attorneys claim the right to proceed with the action for the purpose of showing that more than \$50 was due. At least, such is the nature of the claim in its essential character, as would be shown if an answer had been served. Parties, however, do not always succeed in proving what they assert. The plaintiff might be unsuccessful, and it would then appear that the attorneys had no lien beyond the taxable costs. The experiment that the theory of the respondent proposes should not be made at the expense of both the parties.

What has been said does not refer to the taxable costs. It would appear that the attorneys had a lien for them. The motion should have been denied as to them. The judgment as to the amount of recovery should have been reduced to \$50. It was correct to provide that the motion costs be paid by the defendant.

Although this result requires a modification of the order made below, it seems to be in accordance with *McCabe v. Fogg* (2 Month. Law Bull. 7.)

Order modified as indicated above, without costs to either party.

TRUAX and O'GORMAN, JJ., concurred.

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WILLIAM SCHULTZ, BY GUARDIAN, ETC., APPELLANT,
v. THE THIRD AVENUE R. R. CO., RESPONDENT.

Security for costs from infant plaintiff, in what actions may be demanded.—
Code Civ. Pro. §§ 3268, 3347, subd. 4, 13, construed.

The defendant is entitled, under § 3268, *Code Civ. Pro.*, to demand security for costs in an action by an infant plaintiff, though such action was begun before the passage of said Code; viz., in December, 1877.

The rule requiring that a statute shall not be construed so as to have a retroactive effect, unless necessary to give operation to some portion of it, is not applicable to said section, since it has not actions for its subject, but only a proceeding in an action, thereafter to be taken.

Subdivisions 4 and 13 of § 3347, *Code Civ. Pro.* are not to be construed as limiting § 3268 to actions begun before September 1, 1877. An inspection of the whole of said section shows that its discriminations do not turn alone upon the time of the commencement of the actions.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 19, 1883.

Appeal by plaintiff from order requiring plaintiff to give security for costs under section 3268 of the Code of Civil Procedure.

The action was begun in December, 1877. The motion below, that plaintiff give security for costs, was made in September, 1882. Section 3268 enacts that "The defendant in an action brought in a court of record, may require security for costs, to be given as prescribed in this title where the plaintiff was when the action was commenced . . . 5, an infant whose *guardian ad litem* has not given such security." This section is contained in title 3, chapter 21 of the Code. The guardian in this action had not given such security.

The objections to the motion were, 1st, that the section cited could not be construed to operate retroactively as to actions that had been begun before the section took effect, viz.: on September 1, 1880, subject to the qualifications contained in section 3347; and, 2nd, that the construction of the 4th and 13th subdivisions of section 3347, was, that

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section 3268, under which the motion was made, should not apply to actions begun after September 1, 1877.

Stillwell & Swain, for appellant.

Lauterbach & Spingarn and *H. Morison*, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—It is claimed that if the Code had not made a specific provision as to the actions to which section 3268 should be applied, the rule of construction that in general “a statute shall not be so construed as to operate retrospectively, or take away a vested right, unless it contains an enumeration of the cases in which it is to have such an operation, or words which can have no meaning, unless such a construction is adopted” (*Broom’s L. Max.* 4 ed. 28, approved in *Amsbry v. Hinds*, 48 N. Y. 60), would demand that the section be not applied to actions that were pending when the section became law. It was not claimed that the legislature was without the power to make the provision applicable to pending actions. The plaintiff had no vested right of property which the constitution would protect. He was not aided by the consideration that might be favorable to his claim, that the granting of the application might open some proceeding that had given him a substantial right or some adjudication that had been final in his favor. The subject of the statute was not new. It was a repetition of a provision of the Revised Statutes (2 R. S. 620, § 1), and related to a remedy in so far as it was a condition of bringing or continuing an action. The proposition is simply that the statute, making no reference to pending actions, shall be intended to refer only to future actions. This, however, is not a pertinent consideration when it is perceived that the section does not intend to make its subject actions pending or not pending. Its subject is a proceeding in an action to be taken in the future, and the only reference to actions is that at the time of the future application they must be of the kind, and in the state specified by the section. The statute need not, therefore, be construed to operate retrospectively, to just-

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ify granting the motion below which was made after the statute was passed.

To prevail, then, the appellant must be right in claiming that from the effect of other sections of the Code, this particular section is not to be applied in actions begun after September 1, 1877. The argument is that section 3347 regulates and qualifies the application of certain sections of the Code according to the time when actions were begun, that the 4th subdivision of the section declares that certain parts of chapter 5 and the whole of chapter 6, apply only to an action commenced on or after September 1, 1877, in the supreme court, a superior city court, the marine court of the city of New York, or a county court; that subdivision 13, in declaring that in chapter 21, titles first, second and third, in which last title section 3268 comes, apply only to an action in one of the courts specified in subdivision 4, and in omitting to specify the actions to which chapter 21, titles 1, 2 and 3 shall apply as actions commenced on or after September 1, 1877, intends that they shall not be applied to actions commenced after September 1, 1877, but only to actions begun before September 1, 1877, the present action having been begun in December, 1877. An inspection of the whole of section 3347 shows that it did not intend to make its discriminations turn only upon the time when actions might have been begun. It also had regard to persons and proceedings. The provision of subdivision 4 referred not only to actions being begun after September 1, 1877, but also to the courts in which they should be commenced. If you assume that subdivision 13 does not intend to refer to the time of beginning actions by implication, then the argument rests upon the consideration that section 3268 went into effect on September 1, 1880. That has been already considered. On the other hand, if any implication was intended by omitting to say that chapter 21 was to be applied to actions begun after September 1, 1877, when subdivision 4 and others had made such an application, that implication would be that chapter 21 was intended to apply not only to actions after that date but

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also to those begun before it, which of course does not aid the appellant.

I am opinion that the court below had authority to require the plaintiff to give security for costs, but the order should have complied with section 3272, in requiring the plaintiff to pay into court the sum of \$250, to be applied to costs, if any, or at his election to give the undertaking specified in the order that was made.

The order should be modified in the respect indicated, without costs to either party.

TRUAX and O'GORMAN, JJ., concurred.

SAMUEL SCHWENK, ET AL., RESPONDENTS, v. ROBERT NAYLOR, APPELLANT.

Pleading—construction of.—Order of arrest.—False representations.

In an action to recover damages for inducing plaintiff to part with his money by false and fraudulent representations, the complaint alleged that defendant stated to plaintiff that he (defendant) was "the sole owner of the stock of a certain corporation . . . which company owned and held the title to about thirty-three acres of land situated at Appalachicola, Franklin county, Florida, having thereon a large and valuable saw-mill . . . water front . . . wharves, all of which he represented to be of great value and a rare investment." The complaint further stated that defendant "pretended to point out to plaintiff the metes and bounds of said lands," and "further pointed out that the company's land included, etc." Defendant's ownership of the stock was fully proven by his affidavits.

Upon a motion to vacate an order of arrest,—*Held*, that the clause "which company owned, etc.," and those which follow, are to be deemed descriptions of the property made by the pleader, and not allegations of statements made by defendant to plaintiff; that the allegation "all of which he represented to be of great value, etc.," concerns a matter of opinion, not of fact; that the words "pretended to point out," and "pointed out," are not the equivalent of said or represented; and that, as the above were the false representations relied on, and as they were not stated in the complaint with definiteness and certainty sufficient to constitute such a cause of action, the order of arrest must therefore be vacated.

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Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 19, 1883.

Appeal by defendant from order denying his motion to vacate an order for his arrest.

The facts appear in the opinion.

William L. Snyder and William B. Putney, for appellant.

Joseph Fettrich and A. R. Dyett, for respondents.

BY THE COURT.—SEDGWICK, Ch. J.—I am of opinion that the order of arrest should have been vacated, on the ground that the affidavits did not show fraud as to the cause of action which the complaint alleged.

The claim is that the complaint shows that by reason of false and fraudulent representations made by the defendant, the plaintiff was induced to part with certain moneys. The complaint to sufficiently set out such a cause of action must state with directness and certainty that the defendant made the representations. The part of the complaint which shows what the defendant did state is as follows: That the defendant "stated and represented to the plaintiffs that he was the sole owner and holder of all the shares of the capital stock of a certain corporation, formed under the laws of this State, and known as the Central Florida Mills & Lumber Company, which company owned and held the title to about thirty-three acres of land situated at Appalachicola, Franklin county, Florida, having thereon a large and valuable saw-mill, with its machinery, fixtures, and appurtenances, also having an extensive water front of over two thousand feet, on Turtle Harbor, with large and commodious wharves, all of which he represented to be of great value—a rare investment."

The clauses "which company owned and held the title" to thirty-three acres of land, and "having thereon a large and valuable saw-mill, etc.; also having an extensive water front, with large and commodious wharves, etc.," do not appear to be allegations of statements made by the defend-

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ants, but are descriptions of the property made by the pleader. The rule is, that allegations which are consistent with there being no cause of action are not to be deemed as tending to show a cause of action, and in this case, it as much appears that the defendant did not assert the existence of the facts embodied in the clause referred to as that he did.

The last clause—"all of which he represented to be of great value and a rare investment,"—taken in a sense most favorable to the plaintiffs, does not refer to anything which would make the cause of action on which the plaintiffs rely. It refers to the stock, the land, the mill, the water front and the wharves. The plaintiffs do not deny the value of these; and if they did, the matter was of opinion and not of fact. It does not contain an allegation of a representation that the water front was a part of the property, and the plaintiffs rely for their cause of action mainly on their claim that such a representation was made.

The complaint subsequently alleges that afterwards the defendant met one of the plaintiffs in Florida, and then and there pretended to point out "to that plaintiff the metes and bounds of said lands," and "further pointed out that company's land (included in said thirty-three acres) took in and included all of the land immediately south of the mill between said mill and a certain creek, with said water front of two thousand feet as aforesaid; that the defendant then and there, in repetition of what he had before said in that behalf, reiterated and represented that said water front and wharfage were of great and permanent value to the property and business." Excluding the allegations of "pointing out" and "pretending to point out," this part of the complaint does not strengthen the attempted statement of a cause of action. The words "pretending to point out" and "pointed out," have no definite meaning, and certainly are not the equivalent of said or represented. They describe acts of some kind, and there are no sufficient allegations that these undefined acts were of a fraudulent character. There is no allegation, moreover, that any money was paid

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upon the inducement of the representations set out in the latter part of the complaint. It is consistent with the allegations of the complaint taken together that all the moneys were paid upon the faith in the representations as first alleged.

There remains, then, only the representation first alleged in the complaint, that the defendant owned the shares referred to. There is no doubt of the truth of this representation.

The order appealed from should be reversed, with \$10 costs, and the order of arrest should be vacated with \$10 costs, to abide event.

O'GORMAN, J., concurred.

HENRY GOODWIN, ET AL., RESPONDENTS, v. JACOB GOLDSMITH, ET AL., APPELLANTS.

Demand—when necessary in action to recover goods obtained on false representations.—Attorney—credibility of, when witness in behalf of client.—Commercial agencies—statements to.

In an action brought to recover the possession of certain goods alleged to have been obtained by false representations, as against one who innocently took and held said goods as assignee for the benefit of creditors of the vendees, a demand must be shown; but in such case no demand is necessary as against the vendees who made the assignment.

That the assignee in such case claims in his answer to own the goods, and through the sheriff retakes them, does not obviate the necessity of proving a demand on him.

Where the sole evidence of a demand is given by one of the attorneys for plaintiff, as he is not to be deemed a disinterested witness, and his credibility is a question for the jury, the court should not on his testimony withhold the question of the demand from the jury.

In such an action the evidence showed that four or five months previous to the sale in question, defendants stated to a commercial agency that their liabilities were \$4,500, and their assets \$35,000, which statement was false, and known by defendants to be so; that the statement was made with intent to deceive; and that learning of this statement and relying upon it, etc., plaintiffs made the sale in question to defendants upon

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credit. *Held*, that plaintiffs had a right to presume that defendants solvent condition would continue to the time of the sale, and that if defendants fraudulently concealed their insolvency from plaintiffs the sale was void.

Evidence was admitted showing that defendants made similar representations to other persons about the time of that in question here. *Held*, no error.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 19, 1883.

This is an appeal from a judgment in favor of the plaintiffs entered upon a verdict of a jury, and from an order denying a motion for a new trial made on the judge's minutes.

The action was brought to recover certain goods which the defendants, Jacob and Louis Goldsmith, had obtained from the plaintiffs by and through certain false and fraudulent representations as to their solvency, and by a fraudulent concealment of their insolvency, and which goods they had assigned to the defendant Wertheimer for the benefit of their creditors.

The complaint was amended on the trial so as to allege a demand on the defendants.

Further facts appear in the opinion.

M. H. Regensberger, for the appellants.

Kelly & MacRae, for the respondents.

BY THE COURT.—TRUAX, J.—The court charged the jury that a sufficient demand on the defendants for the goods had been proved, and that on that point they were to find for the plaintiffs. To this the defendants excepted. The evidence of a demand is substantially as follows: One of the attorneys for the plaintiffs testified that he went to the Goldsmiths' place of business; that he did not see the assignee there, but did see the defendant Louis Goldsmith and two clerks, and "made a demand, and they said they had no authority in the matter." This statement he modified somewhat on cross-examination, so that the evidence is very indefinite as to when, and on whom, the demand

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mand was made ; but it was not made on the assignee nor was it made at his place of business.

The assignee came into the possession of the goods innocently, and therefore it was necessary for the plaintiffs to prove a demand for the property on, and a refusal by him to comply with such demands before they could maintain this action against them (*Hall v. Robinson*, 2 *N. Y.* 293 ; *Jessup v. Miller*, 2 *Abb. App. Dec.* 449 ; *Sluyter v. Williams*, 31 *Super. Ct.* 215 ; *Talcott v. Belding*, 36 *Id.* 92 ; *Bliss v. Cottle*, 32 *Barb.* 322).

Whatever evidence there is of a demand was given by one of the attorneys for the plaintiff. He was not a disinterested witness. His credibility was a question for the jury, and the court was not warranted in withdrawing the question of the demand from the jury upon his evidence alone (*Kavanagh v. Wilson*, 70 *N. Y.* 179 ; *Gildersleeve v. Landon*, 73 *Id.* 609).

The learned counsel for the plaintiffs contends that, because the defendant Wertheimer claimed in his answer to own the goods, and because he re-took them from the sheriff, this claim and retaking is inconsistent with any hypothesis that he would surrender them on demand, and obviates the necessity of proving a demand. This position is untenable, and the cases cited by the learned counsel do not sustain the position.

If, in fact, no demand has been made, the plaintiffs cannot recover, and Wertheimer cannot be said to have waived his defense by pleading it.

The evidence shows that the defendants Jacob and Louis Goldsmith had assigned and delivered the goods which they had obtained from the plaintiffs to the defendant Wertheimer before the commencement of the action. This delivery was a conversion of the goods and rendered a demand unnecessary.

The case was submitted to the jury by the court upon the theory that the charge of fraud was proved if the jury believed the Goldsmiths had made false representations as to their solvency to the mercantile agencies, for the purpose

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of having such representations communicated to the persons from whom they purchased goods, and that such representations were communicated by the said agencies to the plaintiffs, and were made for the purpose of deceiving and defrauding the plaintiffs and others, and did, in fact, deceive and defraud the plaintiffs. There was no exception to the charge.

The defendants requested the court to charge, "that a purchaser of goods owed no obligation to the seller to communicate his financial condition." To this the court replied by saying: "He owes no obligations whatever, under such circumstances, except to be honest, and tell the facts, and not fraudulently conceal anything; and, if he has not told any falsehood and has not fraudulently concealed anything, then there is nothing against him and the plaintiffs cannot recover."

The defendants also requested the court to charge, that "a purchaser who received goods on credit need not state to the seller that there has been any change in the financial condition since the prior dealings." In answer to this request the court charged: "There is no law that compels him to do it, but if he keeps silent when he ought to speak out, he must take the consequences, and any purchase he makes under those circumstances will be void." The defendants excepted to each refusal to charge as requested, and to each of the above parts of the charge.

The refusal to charge as requested was not error, because, if for no other reason, the requests were not applicable to the facts of the case.

The evidence shows that the Goldsmiths had dealt with the plaintiffs for some years prior to the purchase of the goods which are the subject of this action, and had paid for all goods they had purchased; that they had made certain representations to mercantile agencies as to their solvency prior to the purchase of these goods; that these representations had been communicated to the plaintiffs; that they were false, and the Goldsmiths must have known

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them to be false; and that the plaintiffs relied on such representations and were defrauded by them.

It must be presumed that the defendants made the representations to Wood & Co.—the Mercantile Agency—for the purpose of having such representations communicated to the plaintiffs, for their guidance in giving credit to them (*Eaton v. Avery*, 83 *N. Y.* 31). Such representations were communicated to the plaintiffs. The case stands, then, as though the Goldsmiths had told the plaintiffs, about four months prior to the time of buying from them that their assets were of the value of about \$35,000, and their liabilities only \$4,500. This statement was false, and was known by the Goldsmiths, at the time they made it, to be false. The plaintiffs had a right to rely on this statement. They did rely on it. The jury found, under the charge of the court, that the representations were made with the intent to deceive, and that they did deceive the plaintiffs, and there is sufficient evidence to sustain this finding. The plaintiffs had a right to presume that this solvent condition of the said defendants would continue to exist at least for four or five months. If the Goldsmiths fraudulently concealed their insolvency from the plaintiffs, with the intention of deceiving and defrauding the plaintiffs, there was no error in the charge as made.

The plaintiffs were permitted to prove, the defendants objecting and excepting, representations made by the Goldsmiths to other persons, at or near the same time, and of a similar character as those which were communicated to the plaintiffs. This was competent upon the question of fraudulent intent (*Miller v. Barber*, 66 *N. Y.* 558).

The judgment and order are reversed as to the defendant Wertheimer, and a new trial is ordered, with costs, to the appellant Wertheimer to abide the event of the action.

The judgment and order against the defendants Jacob and Louis Goldsmith are affirmed, with costs.

O'GORMAN, J., concurred.

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HENRY A. BATE, RESPONDENT, v. WILLIAM O.
McDOWELL, ET AL., APPELLANTS.

*Principal and broker—failure to keep accounts—confusion of property.—
Partnership—assumption by firm of liability for act of member.—
Objection—waiver of.*

Where a broker is employed by his principal to sell certain bonds at the best market price at his discretion, using therein his best care and skill, his refusal, after informing the principal of the sale thereof, to disclose the time of the sale or sales and the amounts realized thereby, raises a presumption against him authorizing the strictest construction of the evidence as to amount, value and price, in an action by the principal to recover the amount received for said bonds.

In such an action, where it appears that the broker sold certain of his principal's bonds, and also certain of the same bonds in which he was personally interested, at a time when the market price was highest, and that the same had been so mixed and confused by him that he was unable to distinguish between them, the jury are at liberty to find that all the bonds sold were the principal's, up to the amount left by him with said broker, and that they were sold at the highest market price.

Where an agent fails to keep or produce accounts, all presumptions of value are against him.

In such a case, where said broker, subsequent to the sale of the bonds, enters into a copartnership with others, viz., his clerks and employees, the agreement providing that said broker should contribute to the firm all the assets and interest in his former business, and such firm thereafter renders to the principal a statement of the transaction admitting a liability thereon less than that claimed by the principal, and admit in their answer that they assumed the sum therein named as part of the liabilities of the original business, they thereby adopt the whole transaction as their own, and are liable for the whole amount due the principal under the above rules, in an action for money had and received.

Where plaintiff reads in evidence a portion of the separate answer of a defendant as to certain matters therein admitted, the objection of the co-defendants that all of the answer upon the same point should have been read, is waived by their examination at large of said answering defendant on the same subject.

Before TRUAX and O'GORMAN, JJ.

Decided February 19, 1883.

Appeal by defendants from judgment entered on ver-

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dict for plaintiff and from order denying a motion for a new trial made upon the minutes.

The facts are stated in the opinion.

J. A. McCreery, for appellants.

John Brooks Leavitt, for respondent.

BY THE COURT.—O'GORMAN, J.—This action is brought for the recovery of money alleged to have been received by the defendants for the use of the plaintiff, the amount claimed being \$12,187.50.

The jury before whom the action was held rendered a verdict in favor of the plaintiff for \$8,187.50. Motions were made on the part of the defendants for the dismissal of the complaint, to set aside the verdict, and for a new trial on the judge's minutes, on the ground that the damages were excessive, and the verdict was contrary to the evidence. These motions were denied, and defendants appeal.

The material facts as they appear in evidence in support of the plaintiff's claim are as follows: On April 1, 1880, the defendants executed a deed of copartnership for carrying on in the city of New York the general banking, brokerage and commission business, under the name of "McDowell Bros. & Company." Previous to that time the business had been carried on by William McDowell, one of the defendants, alone, and the other defendants were his clerks and employees. The partnership deed provided that William O. McDowell was to contribute to the firm all the assets and interest in his business, and that neither of the partners should engage in any other business during the partnership, but each should give his whole time, thought and attention to the purposes of the partnership. For some time before the formation of the partnership the plaintiff had employed this W. O. McDowell to purchase securities for him, and on May 14, 1879, McDowell held in his hands certain bonds called "New Jersey Midlands," the property of the plaintiff. W. O. McDowell wrote to plaintiff under that date that he could sell the "New Jer-

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sey Midlands" so as to give plaintiff a profit of about \$2500, and thought he could invest the proceeds so as to make \$10,000 turn into \$15,000 in the next 90 days. About May 17, 1879, plaintiff had an interview with this defendant, William O. McDowell, in which he told plaintiff that he knew a quiet, stagnant security in the market which could be purchased very low but would advance very soon to a respectable figure, and advised plaintiff to invest in it. McDowell did not then mention the name of the securities. Plaintiff thereupon instructed McDowell to sell the New Jersey Midlands, and McDowell under date of May 17, 1879, furnished the plaintiff with an account in writing showing a balance in his hands after the sale of the "New Jersey Midlands" in favor of the plaintiff of \$8,902.50. A few days afterwards, McDowell called on plaintiff at the store in which he was employed, handed him a check for \$8,902.50, which check plaintiff indorsed, and passed back to McDowell in order that the amount should be invested in other securities.

About a week afterwards plaintiff called at McDowell's office, and was told by McDowell that he had purchased for plaintiff New York and Greenwood Lake R. R. bonds to the amount of \$40,000 par value at the rate of 13 cents on the dollar. Soon afterward, on July 5, 1879, another interview took place between plaintiff and said William O. McDowell, in which the latter told the plaintiff that the New York and Greenwood Lake bonds had advanced to 15 cents on the dollar, while New Jersey Midlands had declined, and asked plaintiff whether he would change the investment, sell the New York and Greenwood Lake bonds and repurchase "New Jersey Midlands," and plaintiff told McDowell to hold the New York and Greenwood Lake bonds and sell them at his discretion at the best market price. After that interview plaintiff called on defendant, W. O. McDowell from time to time during the winter and spring of 1880, to inquire whether the New York and Greenwood Lake bonds had been sold. McDowell said he had not sold them, and would not sell them until he

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could get his price. In June, 1880, plaintiff again called on McDowell, and was told by him that he had sold these bonds, but he declined to state the price, and on being pressed for information on that subject, he said to plaintiff, "you will be satisfied," nothing more. For some months afterward, plaintiff continued to call on W. O. McDowell for an account of sale of these bonds, but without success, until, on October 8, 1880, plaintiff received from the firm of "McDowell Bros. & Co.," of which the defendants are the members, a written statement with the heading "Henry A. Bate, in account with McDowell Bros. & Co.," in which plaintiff is credited, under date of June 26, 1880, with profits on purchase and sale of N. Y. & G. L. bonds less commissions \$700, average interest 4 per cent. and with a balance in favor of plaintiff on the whole account of \$4,397.75. This sum, defendants admit in their answer they had assumed as part of the business liabilities of William O. McDowell, and as due by their firm to the plaintiff.

Plaintiff claims that this account is untrue, in that it does not truly set forth the profits actually realized on the sale of the New York and Greenwood Lake bonds purchased for plaintiff and sold for him at the best market price according to plaintiff's instruction.

It is in evidence that defendant W. O. McDowell declined to inform plaintiff of the price realized by the sale of these N. Y. & G. L. bonds, which in June, 1880, he told plaintiff he had sold, and up to the time of the examination of W. O. McDowell at the trial as a witness in behalf of the defendants, he refused to give plaintiff any information on that subject. He then gave this account of his relations with the plaintiff on the subject: Before any dealing with the plaintiff as to these N. Y. & G. L. bonds, W. O. McDowell had been the secretary of that company, was jointly interested with the firm of Phelps, Stokes & Co., in about \$250,000 worth of them, and he had on hand \$60,000 worth or more which belonged to himself. In the last named lot he gave plaintiff an interest to the extent of \$40,000 at the price of thirteen cents on the dollar. Of this

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alleged arrangement no entry whatever was made in any account book of W. O. McDowell. The bonds were to belong to plaintiff. McDowell was to act as broker, to receive no commission, but only one-half of the profit. W. O. McDowell further testified that he had frequent transactions as to N. Y. & G. L. R. R. bonds before and after his alleged arrangement with plaintiff. He had made efforts to create or improve the market for these bonds, and did improve it until it had reached a point at which he was willing to sell. That he made no distinction between the bonds in which he was interested jointly with Phelps, Stokes & Co., and those in which he was interested jointly with the plaintiff, and had no means of determining in which of them plaintiff was interested; that he sold \$5,000 of these bonds on December 24, 1879, and \$15,000 on January 15, 1880, at twenty cents on the dollar, and credited these sales to the transaction between him and plaintiff, realizing on these sales \$1,400, one-half of which was credited to plaintiff, and one-half of which he took to himself at thirteen cents. That he sold some of the bonds, in which he and Phelps, Stokes & Co. were interested, at twenty-three and some at a fraction below twenty-four cents on the dollar, during January, 1880.

Witnesses on the part of the plaintiff testified that bonds of the N. Y. & G. L. R. R. were sold in the New York market in January, 1880, at twenty-five cents on the dollar.

The questions as to the credibility of the various witnesses, the reconciling contradictions and discrepancies and the comparative weight to be attached to the testimony on both sides were left to the jury, and the question now to be considered is, whether the jury, if they preferred to believe the account of the transaction most favorable to the plaintiff, had evidence enough to justify them in finding, as they did find, that these N. Y. & G. L. R. R. bonds were purchased for and belonged to the plaintiff, were sold for him at the best market price—twenty-five cents on the dollar, and that the defendants, constituting the firm of “Mc-

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Dowell Bros. & Co." are liable to the plaintiff for the amount realized on the sale of said bonds at that rate.

As far as the relations between the plaintiff and William O. McDowell are concerned, it was the duty of the latter, as the broker of the plaintiff, to act on plaintiff's instructions and to sell the bonds at the best market price, using therein his best care and skill.

When, as he informed the plaintiff, he did sell the bonds, he was also bound to inform plaintiff, when requested by him, of the time or times of the sale and the amounts realized by the sale, or sales, and to exhibit toward plaintiff therein perfect good faith and candor; and his refusal to give plaintiff the information on the subject of the sale of the bonds, for which plaintiff asked, and continuing that refusal up to the time of the trial of this action, raises a presumption authorizing the strictest construction of the evidence against him as to amount, value and price (*Wylde v. R. R.*, 53 *N. Y.* 156; *Story's Eq. J.* §§ 308, 315, 316; *Miller v. Kent*, 23 *Hun*, 657).

The market value of the bonds in December and January 1879, 1880, being proved to have been twenty-five cents on the dollar, or, as defendant W. O. McDowell testified, within a fraction of twenty-four cents on the dollar, at which rate he himself sold some of these bonds, it may be presumed that he then did his duty and sold the plaintiff's bonds at that rate.

In case of an agent failing to keep or produce accounts, all presumptions of value are against him.

The fact of W. O. McDowell mixing and confusing plaintiff's bonds with bonds in which he himself had an interest, leaves the jury at liberty to find that all the bonds sold by him up to \$40,000, par value, were bonds of the plaintiff's, and sold at the highest market price (*Story's Eq. J.* §§ 468, 628).

If William O. McDowell was the only defendant, the jury, in my opinion, had enough of evidence before them to warrant, as against him, the verdict which they have rendered in this case.

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The next question is, whether the other defendants, comprising, together with W. O. McDowell, the firm of "McDowell Bros. & Co.," have by any act of theirs so far assumed the liability of W. O. McDowell in this transaction, as to be equally responsible with him for the sale of these bonds at the best market price.

In June, 1880, William O. McDowell informed plaintiff that he had sold the bonds. The partnership had been formed in April, 1880. On October 8, 1880, the firm of "McDowell Bros. & Co." sent to plaintiff an account in writing, written by Van Name, one of the partners, headed: "Henry A. Bate, in account with McDowell Bros. & Co.," in which they set forth and admitted their liability as a firm to plaintiff for the purchase and sale of the plaintiff's bonds, charged themselves with a cash balance in plaintiff's favor, under date of May 19, 1879, of \$8,902.50, being the same balance stated by William O. McDowell in his letter to plaintiff of May 17, 1869. They debit themselves with interest on the balance \$472.87, being interest at four per cent. from the date last mentioned. They debit themselves, on June 26, 1880, with \$700 profit on sale of the bonds, and with a general balance due plaintiff in account with them of \$4,397.75.

By this conduct, in my opinion, they have adopted the whole transaction as their own, both the benefit derived from it, and the responsibility resulting from it as part of the business of William O. McDowell, and if they have erroneously, falsely, or fraudulently misstated or understated the proceeds of the sale of plaintiff's bonds, they are, equally with William O. McDowell, bound to plaintiff to do him right.

If this view of the case be correct, I can see no error committed by the trial judge either in the admission or rejection of testimony, and no valid exception to his charge.

The jury seem to have calculated the amount of the verdict charging against defendants \$10,000 as the selling value of the bonds \$40,000 at twenty-five per cent. In my

Opinion of the Court, by O'GORMAN, J.

opinion there was enough of evidence in the case to justify them in so doing.

A question was raised in this case whether an action for money received by defendants to the use of the plaintiff was the proper remedy, and whether an action for an account was not the correct form of action.

I see no force in that objection. The verdict in this case was founded on the belief entertained by the jury that the plaintiff's testimony was true, that the bonds in question were his bonds, purchased for him, with his money, by the defendant, W. O. McDowell, and their reliance on the unqualified admission of said McDowell in June, 1880, testified to by the plaintiff and by McDowell himself, that he, McDowell, had sold the bonds, and on McDowell's admission that he had sold such bonds in January, 1880, at a fraction below twenty-four cents on the dollar, and on the testimony of other brokers that such bonds at the same time had been sold in the New York market at twenty-five cents on the dollar; and on the facts admitted by said defendant that he had mingled and confused the plaintiff's bonds with bonds of other parties for whom he dealt, and with his own, and also that he had persistently evaded and refused to perform his duty to plaintiff as his broker to give full and specific account of the sale made by him of the plaintiff's bonds, and the prices realized therefrom.

On these facts the jury were justified in finding as matter of legitimate inference that the plaintiff's bonds had been sold at the highest market price that could, with reasonable care, have been obtained for the same, and that the proceeds of such sales were in the hands of the firm of which said McDowell was a partner, and which, under their firm name, rendered an account to plaintiff, in which they acknowledged their connection with the purchase and sale of the plaintiff's bonds and their liability to plaintiff for the same.

It was not necessary to establish that each defendant had personally received a part of the proceeds of these bonds. If the whole proceeds were received by W. O.

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McDowell, one of the partners, all of them would be liable for the entire sum (National Trust Co. v. Gleason, 77 N. Y. 404).

This was a question for the jury, and was left to the jury by the trial judge.

The defendants object that the trial judge erred in allowing the plaintiff's counsel to read as evidence on his behalf, a part of the separate answer of William O. McDowell, without at the same time, and also as part of the plaintiff's case, reading all other parts of the said answer which bore upon the subject.

The right of the defendants to read on their own behalf, all other parts of said answer that bore on the subject was recognized by the court. The defendant, W. O. McDowell, was examined at length on behalf of the defendants, and testified on the same subject, and the defendants had ample opportunity to put his whole answer in evidence if they had been so advised (Mott v. Consumers Ice Co. 73 N. Y. 550).

The plaintiff was not bound to read the whole of the said answer as part of his case, and if, he were, the objection was waived by the defendants, by their examination of William O. McDowell on their own part, and by his testifying at large on the subject (Westlake v. St. Lawrence Mutual Ins. Co., 14 Barb. 212).

In this way, their whole case, in its aspect the most favorable to them, was presented to jury.

The judgment is affirmed, with costs, and the orders appealed from are also affirmed, with \$10 costs.

TRUAX, J., concurred.

Opinion per Curiam.

**ELIZA JOYCE, RESPONDENT, v. MARVEL W. COOPER,
APPELLANT.**

Poor person—when one not permitted to sue as such.—Attorney.

It is inconsistent with the letter and spirit of the Code to permit one to sue as a poor person who has parted with an interest in the claim upon which the action is brought, though the assignment thereof be to her attorney as compensation for his services.

The order permitting a person so to sue must contain a provision assigning to the petitioner an attorney who must act without compensation. Such an order is within the discretion of the court.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 19, 1883.

Appeal by defendant from order permitting plaintiff to sue, as a poor person, under Code of Civil Procedure, § 458 *et seq.*

The facts appear in the opinion.

Norwood & Coggeshall, for appellant.

Dill & Chandler, for respondent.

PER CURIAM.—It did not appear before the learned judge who granted the motion below, that the attorney who appeared for the plaintiff had an interest in the claim in action. This fact appeared by admission on the argument of the appeal. It is inconsistent with the spirit, and in some respects with the letter, of the provisions of the Code on this subject, to allow a plaintiff to sue as a poor person, when she has parted with an interest in the claim. Particular section 460 may be noticed. That requires, as part of the order to be made, that it shall assign to the plaintiff an attorney and counsel to prosecute the action, who must act therein without compensation. The plaintiff's attorney did not propose such an assignment in the order, nor was one made. If the plaintiff had in the nature of her cause of action a substantial value which might be parted with for a consideration, or to compensate her attorneys, there is no

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reason why she should be exempted from responsibility for the costs and disbursements. Section 460 leaves the granting of such an order to the discretion of the court.

Order reversed, without costs.

MICHAEL NOONAN, APPELLANT, v. WILLIAM R. GRACE, ET AL., RESPONDENTS.

Preliminary injunction—when granted.—Legislative authority to common council—when can be delegated to mayor.

To justify granting a preliminary injunction, the plaintiff's rights must be certain as to the law and the facts; and where, in an action for an injunction, the grounds of the preliminary order are not stated therein, and it appears from the complaint that the propositions of law upon which plaintiff's claim rests are doubtful, the order should be vacated.

Whether, under an act of the legislature authorizing the common council of a city to grant certain privileges as to the public streets, "under such reasonable regulations as they may prescribe," said council are authorized to pass a resolution granting such privileges, "upon such conditions as may be prescribed and approved by his Honor the Mayor, etc.," *quære*.

Before SEDGWICK, Ch. J., TRUAX, and O'GORMAN, JJ.

Decided April 9, 1883.

Appeal by plaintiff from order vacating an order of preliminary injunction.

The action was for judgment restraining the defendants, who were respectively the mayor, the comptroller, and the commissioners of public works, of the city of New York, from granting to the Equitable Gas Light Company, a corporation formed under L. 1848, ch. 37, the right to lay gas-pipes in the streets of this city, etc.

John H. Strahan, for appellant.

George P. Andrews, corporation counsel, and *William M. Ivins*, for respondent.—It is a principle uniformly observed that an injunction to stay waste will not be granted where it is doubtful whether the acts complained of are waste; "in such case the question of

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waste or no waste must first be decided" (*Joyce on Inj.* 111). Further than this, "the jurisdiction of equity in restraint of the action of municipal corporations in regulating streets and highways, is exercised with much caution, and is not regarded as a favorite jurisdiction with the courts." "And with the control of matters resting largely on the discretion of municipal authorities equity will not ordinarily interfere" (*High on Inj.* 2 ed. § 587). And apprehension of a future injury, even though preliminary steps may have actually been taken by a public body, sought to be enjoined, does not constitute sufficient ground for interference. Thus it has been held that the presenting of a petition to the commissioners of highways for a private road, and an express determination on their part by ordering a survey of the road, to grant the petition, will not authorize a court of equity to enjoin the proceedings (*Winkler v. Winkler*, 40 *Ill.* 179).

There is not a single fact alleged by the plaintiff which tends to show other than that the defendants have done the best possible for the city.

But even if better terms for the city could have been made, it has been repeatedly held that equity will not enjoin municipal authorities upon the ground that a more advantageous contract might be obtained for certain public franchises (*People v. Mayor*, 32 *Barb.* 102; *High on Inj.* 2 ed. § 1240, and cases there cited).

Further than this, the act of 1848 authorizes the common council to grant their consent under such reasonable regulations as they may prescribe.

BY THE COURT.—SEDGWICK, Ch. J.—In my opinion, the rules of practice and law, call for an affirmance of the order vacating the injunction. The ground upon which the order of injunction was issued was not stated in it. It is necessary to look to the complaint to find on what claim the plaintiff alleges that he is entitled to an injunction. To justify granting a preliminary injunction the plaintiff's rights must be certain as to the law and the facts.

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One claim is apparently as follows: the legislature provided (*L.* 1848, ch. 37, § 18) that any gas-light company formed under that act, should have power to lay conductors for conducting gas, through the streets of cities, with the consent of the municipal authorities of said city, and under such reasonable regulations as they might prescribe. The complaint then avers that the common council of this city duly enacted a resolution "that permission be and is hereby given to all incorporated gas-light companies to lay gas-pipes, etc., in the city, etc., upon such conditions, as may be prescribed and approved by his Honor the Mayor, the Comptroller and the Commissioners of public works, etc." The complaint then alleges certain matters intended to show that this resolution had been impliedly repealed or was no longer in force. These matters did not have the force intended, but on the face of the complaint it appears that the resolution is still in existence. The complaint then alleges what is tantamount to an averment that the common council had no power to pass this resolution, because it delegated to officers named in it, the exercise of power and discretion that the act intended should be exercised by the common council itself. In my opinion, this proposition is not so clearly correct, that it should be assumed, as the ground for an injunction. There is doubt, that that part of the resolution which gives permission upon such conditions as may be prescribed, and approved by his Honor the Mayor, etc., is not within the clause of the act "under such reasonable regulations as they may prescribe."

The complaint further claims an injunction upon the character of the conditions, which it is alleged the defendants intend to impose upon the company, averring that these conditions do not properly provide for the benefit or advantage of the tax-payers or inhabitants of the city. On this point the preponderance of testimony was with the defendants, who showed by a witness of greater means of information than those possessed by plaintiff's witness, that the defendant did not intend to give a permit upon the

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conditions referred to, but had expressed the intention of imposing other conditions, more favorable to the city.

The order appealed from should be affirmed, with \$10 costs.

TRUAX and O'GORMAN, J., concurred.

SAMUEL RAYNOR, ET AL., APPELLANTS, v. THE
PACIFIC NATIONAL BANK OF BOSTON,
RESPONDENT.

*Attachment against national banks.—Insolvency—what implied by in § 5242,
U. S. Rev. Stat.*

The proper construction of § 5242, U. S. Rev. Stat., is that no attachment can be issued against a national banking association or its property after it has committed an act of insolvency, and the word "insolvency" therein has its usual and general meaning, viz.: a condition of inability to meet current pecuniary obligations.

The fact that such a bank had stopped business for several weeks before, and did not do business for several weeks after the attachment was allowed, without clear explanation, raises a presumption of insolvency.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 9, 1883.

Appeal from order granting motion to vacate attachment of property of defendant.

The motion was made on the ground that the attachment was contrary to the provisions of U. S. Rev. Stat., § 5242, the defendant being a national bank. The motion was made by the receiver of the property, etc., of the defendant.

The action is to recover the amount of a certificate of deposit for \$5,000 issued by defendant October 6, 1881, payable to the order of one George E. Horne on demand, and assigned to plaintiffs.

The complaint and the affidavit on which the warrant of

Appellant's Points.

attachment was issued, alleges that the certificate in question was duly presented for payment to the defendant and payment duly demanded, which was refused.

The warrant of attachment was issued thereafter, viz., on January 9, 1882, and on January 10, 1882, the same was levied upon a balance of \$37,000 to the credit of the defendant in the National Park Bank, in New York.

At the time of issuing the warrant of attachment and of the levy thereunder, the defendant had closed its doors, suspended business, and was then in charge of a national bank examiner, acting under the authority and direction of the comptroller of the currency.

On May 22, 1882, Linus M. Price was duly appointed receiver of the defendant by the comptroller of the currency, and the said Price duly qualified and entered upon the discharge of his duties.

Further facts appear in the opinion.

Thornton, Earl & Kiendl, for appellants.—The decision below cannot be upheld on the ground on which the justice puts it, viz., solely on the legal ground that by § 5242, U. S. R. S., no attachment can be granted by a State court against any national bank, solvent or insolvent. In this position he is clearly overruled by the express terms of *Robinson v. National Bank of Newberne* (81 N. Y. 385), holding that the inhibition applies only to insolvent banks.

The burden of showing the insolvency of defendant is upon it; and unless it clearly makes that fact to appear, the attachment must be maintained (*Market National Bank of New York v. Pacific National Bank of Boston*, *Daily Reg.*, September 30, 1882, HAIGHT, J.).

The defendant, by the terms of the United States Banking Act, cannot be regarded as insolvent until May 22, 1882. That act points out precisely when national banks shall be regarded as insolvent, and how insolvency shall be shown. We claim, therefore, that it was legally solvent, as to attaching creditors, until legally declared insolvent for legal cause, which was on May 22, 1882, when the receiver was

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appointed, or four months and twelve days after our attachment was levied.

Vanderpoel, Green & Cuming, Delos McCurdy and Willard Bartlett, for respondent.—Aside from the overwhelming proof of actual insolvency, the refusal of the defendant to pay its certificates of deposit on November 19, 1881, was an act of insolvency under § 5242 (*Irons v. National Bank*, 6 *Biss.* 301; *Brown v. Montgomery*, 20 *N. Y.* 287; *Bump Bank*. [10 ed.] 33). In *Horton v. Pacific Bank* (unreported), general term, first department, January, 1883, BRADY, J., uses the following language: “The refusal of the defendant to pay the instrument sued upon, viz., a certificate of deposit, on April 19, 1882, assuming that it was presented at that time, as alleged by the plaintiff, was an act of insolvency. It is quite evident from the proofs submitted in this case that the refusal to pay was founded upon inability to comply with the demand. It may be said that the refusal to pay it on presentation was an act of insolvency in itself, under section 5242 of the banking act, if it were necessary to invoke this principle in this case to maintain the order appealed from (*Irons v. Manufacturers’ National Bank*, 6 *Biss.* 301; *Brown v. Montgomery*, 20 *N. Y.* 287–291); but it is not, because proofs *aliunde* the refusal are presented.”

BY THE COURT.—SEDGWICK, Ch. J.—The construction of U. S. Rev. Stat., § 5242, is, that no attachment shall be issued against a national banking association or its property after it has committed an act of insolvency (*Robinson v. National Bank of Newberne*, 81 *N. Y.* 385).

The learned counsel for appellants argued that the insolvency referred to in § 5242 was of the kind that was referred to in the other parts of the acts on the same subject, such as allowing circulating notes to go to protest (§§ 5226, 5227–5234), or allowing judgments recovered to remain unpaid for thirty days (act of June 30, 1876), or by the determination of the comptroller of the currency after an examination (§ 5244). A consideration of the character and

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policy of § 5242 shows that in it, the word insolvency has its usual and general meaning, viz., a condition in which it cannot meet its current pecuniary obligations. In effect, this was decided by the general term of the supreme court at its term of January, 1883 (MSS. of Judge BRADY, citing *Irons v. Manufacturers' National Bank*, 6 *Biss.* 301).

The other claim is, that there was no proof that at the time the attachment was allowed the bank was insolvent. The proof of insolvency was too strong to sustain any supposition that the bank could then have been solvent. The bank had stopped business for several weeks before, and did not do any business for several weeks after the attachment was allowed. Without some clear explanation of these facts, the inference is it must have been unable to meet its current pecuniary obligations. The plaintiff himself says in his affidavit, that he is informed that it is in embarrassed circumstances, and is about to or has already failed, and so believes, after presentation of the certificate of deposit, as to which the action is brought. After a while the bank began business and continued it for some time, until it finally abandoned any attempt to go on. The evidence shows that it resumed business because of its receiving money, which it did not control, and was not entitled to at the time it first stopped or when the attachment was allowed.

The order appealed from should be affirmed, with \$10 costs.

O'GORMAN and INGRAHAM, JJ., concurred.

Statement of the Case.

DANIEL G. BACON, ET AL., APPELLANTS, v. CHARLES B. KENDALL, ET AL., RESPONDENTS.

Arrest—when individual partner may be arrested in action against firm.

In an action upon contract against partners, to justify an arrest of any defendant, it is necessary to prove that he actually and individually participated in the fraud which is alleged to be connected with the contracting of the liability.

Where the fraud alleged is the purchase of goods when the firm was hopelessly insolvent, the concealment of said fact, and the intent not to pay for said merchandise,—each partner will be presumed to be acquainted with the accounts and affairs of the firm.

That one of the partners was served with summons in an action against the firm on a business indebtedness of a large amount, and long overdue, is a fact which makes strongly against him on motion to vacate an order for his arrest, upon the question of his belief in the firm's solvency.

Before SEDGWICK, Ch. J., and O'GORMAN, J.

Decided April 9, 1883.

Appeal by plaintiffs from order vacating an order of arrest as to defendant Charles B. Kendall.

The order of arrest was made under *Co. Civ. Pro.* § 549, subd. 4.

The complaint was upon contract, and alleged that the defendants were guilty of a fraud in contracting the liability. The contract averred was that the plaintiff sold and delivered to defendants certain merchandise of the value of \$11,308.90, which the defendants agreed to pay; the fraud alleged was, that at the time of the sale the defendants were hopelessly insolvent; that they fraudulently concealed their insolvency and bought the merchandise, then intending not to pay for the same.

The affidavits on which the order of arrest was granted, showed that at the time of the sale the defendants were partners in business and had so been for some years; that the names of the partners were Charles B. Kendall, as to whom the order of arrest was vacated, and Hugh F. Kendall; that for a long time the business of the firm had been in an embarrassed state; that it had bought goods in large

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quantities and had immediately sold them, at loss, and below market prices; that at the time of the sale an action for a business debt of \$13,000 had been pending for some months against the firm, and judgment was taken by default of answer, a few days after the sale; that Charles B. Kendall knew of this action, the summons having been served upon him alone, and he had not informed Hugh F. Kendall of this service; that by the books of account of the firm it appeared that the firm was insolvent.

The affidavit of Charles B. Kendall averred that his knowledge of the actual state and conduct of the business was solely derived from oral statement made by Hugh F. Kendall; that he was younger than the latter and confided in him; that he exclusively attended to a part of the business, the control of which did not involve a knowledge of those matters which were claimed to show fraud by defendants. The affidavit of the book-keeper of the firm tended to show that Charles B. Kendall had no knowledge of the contents of the books of account, and averred that no statement of account had ever been given to him. It was further shown that the purchase in question had been, in fact, made by Hugh F. Kendall, and Charles B. Kendall did not know of it until after the delivery of the goods.

John Sidney Davenport, for appellants.

Frederick H. Man, for respondents.

BY THE COURT.—SEDGWICK, Ch. J.—The cases of the *Bank of Commonwealth v. Temple* (39 *How* 432), and *Hathaway v. Johnson* (55 *N. Y.* 93), sustain the proposition that in an action against partners on contract, to justify an arrest of any defendant, it is necessary to prove that he actually and individually participated in the fraud, which it may be alleged was connected with the contracting of the liability. It is necessary to show by affidavit “that the defendant was guilty of a fraud in contracting or incurring a liability.” The court of appeals, in *Hathaway v. Johnson* (*supra*) said of a like provision of the Code of Procedure (§ 179), “He must have been guilty of a fraud;

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and this implies personal misconduct, moral or actual, and not merely legal or constructive fraud, in respect to the transaction which is the subject of the suit."

The affidavits showed guilt on the part of Hugh F. Kendall. They also presented facts, which, if not explained, would support the conclusion that Charles B. Kendall was guilty also. On the motion below, the latter did attempt to make explanation. It is, at once seen, that the improbability is great, that he should be so ignorant of the affairs of the firm, as it was necessary to show that he was, to make a sufficient explanation. It was not impossible, however, that he should entirely trust to his brother, and with great negligence indeed, but no criminality, omit to look at the accounts, and not inquire as to those details of the business, which were not in his own charge. It is a fact of great weight against him, that an action was pending against the firm for \$11,000, for a business indebtedness over-due for a long time, in which service of summons was made upon him, and that he should still believe that the firm was solvent, and could honestly continue to make purchases. Again, however, it was possible, that he should believe that the firm was able to pay this indebtedness, if the leniency of the creditors would allow the firm to apply the necessary cash to its other general business, while paying the indebtedness, in convenient installments, and that he should believe that the creditor after beginning his action would, in fact, extend as much leniency in the future as he had in the past.

The point then, was, on the motion to vacate the order of arrest, did the defendant show this possible, but improbable state of things? The answer to this depended upon the credence due to the defendant. His assertions were somewhat corroborated by the affidavit of the book-keeper, and by some intrinsic probabilities arising from the mode of conducting the business. On this appeal, I cannot find what would justify a difference in opinion from the judge below, who was satisfied that the affidavit of the defendant was truthful.

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The order appealed from is affirmed, with \$10 costs.

O'GORMAN, J., concurred.

**HENRY SMID, RESPONDENT, v. THE MAYOR, &c.
OF NEW YORK, APPELLANTS.**

*Public streets—duty of municipal corporation.—Notice.—Evidence.—Trial—
presumption as to theory of.*

In an action against the city of New York to recover damages for injury sustained by plaintiff in slipping upon snow and ice on the public street in a district much frequented and densely populated, where the evidence for plaintiff showed that for two weeks prior thereto, the sidewalk had been dangerous by reason of snow and ice thereon, and the testimony for defendant tended to overcome plaintiff's evidence, and showed that the sidewalk had not been dangerous till the afternoon of the day on which the plaintiff was injured, and that the snow, etc., was then put upon the sidewalk by boys to make a slide.

Held, that a verdict for plaintiff should not be set aside; that the jury could properly have been charged to determine whether, if ordinary observation or diligence had been used by the agents of the city, they would have had notice of the danger, which the city was bound to remove upon notice of it; and that as the charge is not set out in the appeal-book, it is to be presumed that the jury were properly charged.

It was the duty of the city to use due diligence through its agents in observing whether the sidewalk remained in a safe state, and in ascertaining that there was an appearance of its passing from a safe to an unsafe state; and the more apparent the danger coupled with the apparent gravity of it, and the more frequented and densely populated was the place, the more likely should be the danger to meet the observation of the city's agents, soon after it occurs.

In such a case, evidence that a passer-by, immediately after the happening of the accident in question, slipped and fell on the same spot, is admissible as tending to show the dangerous condition of the street.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 9, 1883.

Appeal by defendants from judgment entered upon verdict in favor of plaintiff, and from order denying motion for new trial made upon the minutes.

Opinion of the Court, by SEDGWICK, Ch. J.

The action was for damages for personal injury sustained by plaintiff in slipping upon snow and ice, negligently permitted by defendants to lie upon the sidewalk of a public street in the city.

The facts and defendants' exceptions appear in the opinion.

George P. Andrews and *Charles Blandy*, for appellants.

Steen & Myers, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—There was no error in the court leaving to the jury the question of contributory negligence on the part of the plaintiff. There was evidence in the narration by the plaintiff as to the care he was exercising when he fell. He was apprehending the danger of slipping. He gave a warning to a friend. From this and the general account of what he had been doing and of how he fell, the jury were at liberty to infer caution and care of an ordinary kind on his part.

At the end of plaintiff's testimony, the defendants' counsel moved to dismiss the complaint, on the ground that there was no evidence of any knowledge brought home to the city of the condition of the sidewalk on which plaintiff slipped. This motion was properly denied, because, as the case then stood, the jury were at liberty to find that the sidewalk had been for two weeks dangerous to passers, from the snow and ice there. The testimony for defendants was then given and controverted the testimony of the plaintiff materially. Especially the defendants' testimony was important to show that the snow had not made the sidewalk dangerous until the afternoon of the day, in the evening of which the plaintiff was injured, and that the snow was placed upon the sidewalk and steps of a house by boys to make a slide from the top of the steps to the curb. If this conflict of the witnesses were decisive of the case, there might be strong reason to argue that there was no preponderance with the plaintiff. If, however, the jury could find from the testimony given for the defendants, facts which

could make the defendants liable, the verdict should not be set aside by reason of the conflict.

The argument for defendants assumes, that if the sidewalk was in a dangerous condition, only for the time described by the defendants' witnesses, then there was no ground of proof that the defendants had notice of the slippery state of the sidewalk, which it was negligence on their part not to remedy, in case they had notice. I do not think that the argument is sound. Part of the duty of the city was to use ordinary diligence in observing whether the sidewalk remained in a safe state, and in ascertaining that there was an appearance of its passing from a safe to an unsafe state. This diligence is to be exercised through its numerous agents whose duties have regard to the safety of the streets. Policemen are among those agents. The more apparent the danger, coupled with the apparent gravity of it, the more likely it is to meet the observation of these agents soon after it occurs, when they are using due diligence. The same may be said in respect of the place where the accident happens, if it be much frequented, surrounded by a dense population and not in a retired part of the city. In the present case, the obstruction made by the snow and ice was clearly apparent, was very dangerous, and in Forty-ninth street between the Third and Second avenues. The jury, from these circumstances, could be properly charged to determine, whether if ordinary observation or diligence had been used by the agents of the city, they would have had notice of the danger, which the city was bound to remove upon notice of it. The charge of the court is not set out in the case, and it is to be presumed that the correct view of the law was given to the jury. The defendants were not entitled to a dismissal of the action or a verdict in their favor, if to any facts which the jury might find, the law attached responsibility.

The defendants' counsel on the argument urged that the following exception called for a reversal. For the plaintiff a witness was asked: Q. "Do you know whether or not others had slipped at that place; did you use to see others slip at that place?" The exception to the admission of this

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question was to be considered in view of the facts brought out by the answer, which were: "I have seen during the time we were lifting up Smid and into the wagon, a lady pass by and she slipped on that slide; she slipped on the spot where Mr. Smid fell; she fell where it went sliding down into the street." The facts contained in the answer were, in my opinion, relevant to the issue of the existence of the slippery condition of the walk, at the very point where the plaintiff slipped. How smooth or how unsafe for the putting down of the feet, was the place, could not be described by attempting to state the physical appearance, so practically, as by a statement of what ensued upon the place being used by a passer.

The judgment should be affirmed, with costs, and the order denying motion for a new trial should be affirmed, with \$10 costs.

O'GORMAN and INGRAHAM, JJ., concurred.

JAMES A. GILBERT, APPELLANT, v. THE THIRD AVENUE R. R. CO., RESPONDENT.

Examination of party before trial—purpose of—when vacated.

If the papers upon which is granted an order for the examination of a party before trial, show upon their face that it is to be used not to obtain evidence for the trial, but for another object, the order should be vacated. Whether this so appears is to be ascertained by construing the affidavit as a whole.

Before SEDGWICK, Ch. J., and O'GORMAN, J.

Decided April 9, 1883.

Appeal from order denying motion to set aside order made for examination of plaintiff before trial.

D. J. Newland, for appellant.

William N. Cohen, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—The purpose of the Code, in its provisions as to the examination of parties

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before trial, is to allow the opposite party to obtain before trial, testimony that may be used as testimony upon the trial. If the papers upon which the examination was ordered, show upon their face, that it is to be used, not to obtain evidence for the trial, but for another object, the order should be vacated.

The affidavit on which the order for examination was granted, uses an ambiguous phrase in averring that deponent "desires to examine the plaintiff, and purposes to use the testimony so taken upon the trial of this action." If this were all, and were not afterwards qualified, the appeal would be determined by the real meaning of this averment. It is, however, qualified so as to give a meaning to the whole affidavit, which shows affirmatively that the purpose was not to read the examination upon the trial as evidence in the cause. The affidavit proceeds to aver that the examination is material and necessary in the preparation and defense of the action. It has always been held that an examination cannot be had to prepare for a defense or for trial. This particular averment means, under the circumstances, that the examination is necessary for the defense, inasmuch as preparation is necessary for defense. For, the affidavit then states, that the facts which render the examination material and necessary, are the following, viz.; that the complaint alleges certain facts, but omits to set forth certain other facts, and "without these and other important facts and details, defendant cannot properly prepare the defense in this action, and safely proceed to trial." As to the rest of the facts, of which knowledge or information is asked, the affidavit says, "to properly prepare this case for trial, it is material and necessary that an examination of the plaintiff be had before trial."

In this way the papers affirmatively show that the object of the examination was not to procure testimony upon the trial, but information to use in preparation for trial. For this reason the motion to vacate the order for examination should have been granted.

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Order appealed from reversed with \$10 costs, and order vacating order for examination granted with \$10 costs to plaintiff, to abide event.

O'GORMAN, J., concurred.

JOHN H. HUBBELL, AS ASSIGNEE, ETC., APPELLANT, v.
PETER BOWE, RESPONDENT.

Evidence—former affidavit of witness, when cannot be used on his examination.

A line of examination cannot be allowed, which in effect puts in evidence the affidavit of a witness made a long time previous to the trial, instead of his direct oral statement of his present recollection of the facts therein deposed to.

Accordingly, where, on the direct examination of a witness, his affidavit sworn to a year before, was read by its respective paragraphs and he was asked, if he swore to that, and if it was true, and his affirmative answers were received,—*Held*, error, it not appearing that the witness's recollection was defective, or that the paper was shown to and read by him for the purpose of aiding his memory.

On an action by an assignee for the benefit of creditors against the sheriff to recover possession of certain goods taken by the latter, in which the sheriff justifies under certain attachments against the plaintiff's assignor, and claims that the assignment was void as being in fraud of creditors,—evidence is admissible in behalf of plaintiff to show that the creditors who had attached were present at a meeting of creditors, at which, upon plaintiff's announcing that he intended to withdraw from the trust, a unanimous resolution was passed requesting him to remain. Such evidence tends to show a waiver by said attaching creditors, of their right of priority. *Per* O'GORMAN, J.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 9, 1883.

Appeal from a judgment entered February 25, 1882, in favor of the defendant and against the plaintiff, with costs.

The facts and exceptions appear in the opinion.

William P. S. Melvin and *Dewitt C. Brown*, for appellant.

Charles F. MacLean, for respondent.

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BY THE COURT.—O'GORMAN, J.—The action was brought to recover possession of certain goods valued at \$1,300, taken from the possession of the plaintiff by the defendant.

On October 18, 1880, Sigismund Philip and Rudolph Toense, then copartners in business under the name of "Sgm. Philip & Toense," executed and delivered to the plaintiff an assignment in writing of all their copartnership and individual estate in trust for the benefit of their creditors. The plaintiff thereupon took possession of the property assigned. On October 22, 1880, the defendant seized some of said property, claiming the right so to do as sheriff, and held same by virtue of warrants of attachment duly issued on the applications of various creditors of the firm, and dated respectively October 22, 23 and 25. The defendant claims that the assignment to plaintiff was made with intent to hinder, delay, and defraud the creditors of said assignors. The jury rendered a verdict for the defendant.

The plaintiff's counsel moved on the minutes of the court to set aside the verdict, and for a new trial on the exceptions, and because the verdict was contrary to law and the evidence. This motion was denied.

Among the exceptions taken by the plaintiff's counsel, the following seem chiefly worthy of notice. Testimony was duly offered on behalf of the plaintiff to prove that at a meeting held by the creditors of the assignors, soon after the assignment, at which meeting the attaching creditors were present, they unanimously passed a resolution requesting the plaintiff to go on as assignee, and the plaintiff on being informed that such was the result of the meeting consented to go on as assignee. This offer and testimony were excluded by the court, as immaterial and incompetent.

Inasmuch as the defendant's justification for the taking of the property in question depends on the truth of his allegation that the assignment to the plaintiff was made with intent to hinder, delay and defraud the creditors, and that therefore no title to the said goods became vested in the

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plaintiff, the fact that the creditors, including those who had attached, unanimously requested the plaintiff to continue as assignee, might raise a question proper for the jury to consider whether these creditors had not thereby waived their claims to priority under their attachments—acquiesced in the assignment and elected to take their chances with the other creditors in the distribution as contemplated by the assignment.

On November 3, 1880, Rudolph Toense, one of the assignors, made an affidavit describing the conduct of the business of the assignors for some time before the assignment. There is no evidence that any undue influence was used to induce him to make this affidavit, or that he was an unwilling witness at the trial or in any way hostile to the defendant, on whose behalf he was examined. In the course of his direct examination, he was interrogated by the counsel for the defense thus: "Do you recollect to have sworn that piece goods were sold at auction at your house?" This question was objected to, and allowed; and plaintiff's counsel duly excepted. A paper was then shown to witness and he said: "That is my signature; I don't know whether or not it was on that day (November 3, 1880), but I know I have sworn to an affidavit." Thereupon the defendant's counsel proceeded to question the witness in this manner: "Did you not on that day swear that, from your own knowledge, said Philip bought goods on credit, etc.?" To this question, and others in a similar form, the witness answered thus: "I swore my statement was true. 'That was done.' 'That statement was true, etc.'"

This mode of examining a witness is for many reasons objectionable. It is, in effect, putting in evidence the affidavit of the witness, and his declarations, made more than a year previous to the trial, in place of his direct oral statement to the jury of his present recollection of the facts.

There was no attempt to show that his memory of these facts was defective and needed refreshment; nor does it appear that the affidavit was presented to the witness and read by him for the purpose of aiding his memory, so that

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thus aided, it could of itself recall the events in question. Paragraph after paragraph was read out to him, and he was asked: "Did you not swear that, and if you did, was the statement true?"

This is not the best evidence, nor is it a safe or proper way of endeavoring to elicit the truth. The natural indisposition of one who had sworn to an affidavit to contradict it on the witness stand, was an influence tending to hinder the free, full, and open disclosure of the truth, and although the witness was subject to cross-examination, yet his testimony so elicited by counsel for the defendant is not free from suspicion, and it is impossible to say what effect it may have produced on the jury. Such a practice is wrong and should be discouraged.

Judgment reversed, with costs, and order appealed from reversed, with \$10 costs.

SEDGWICK, Ch. J.—[Concurring.]—I agree with Judge O'GORMAN, as to the last reason for reversal and differ with him as to first.

INGRAHAM, J.—[Concurring.]—I concur with the Chief Judge to reverse on the last ground stated in opinion of Judge O'GORMAN.

GEORGE N. SMILEY, RESPONDENT, v. HORACE B. FRY,
AS SURVIVOR, &C., APPELLANT.

*Banking—instrument for payment of money, when deemed certificate of deposit.
—Statute of limitations—when runs on certificate.—Demand—evidence of.*

An instrument given by a firm of brokers, who also received deposits on demand, in the following form, viz: "Due A., Trustee, \$4,000, returnable on demand. It is understood that this sum is specially deposited with us and is distinct from the other transactions with said A."—is to be construed as a certificate of deposit of the sum named, with said firm, as bankers *pro hac vice*.

No indebtedness arises by reason of said instrument, nor does the statute of limitations begin to run thereon until a demand for the return of the amount has been made.

Respondents' Points.

An action on said certificate against the personal representatives of a deceased member of said firm and the surviving partner, in which the surviving partner is not served and does not appear, is not a demand as against him.

It seems, that the rendition of a statement of account by the depositor to said firm in which the claim on said certificate is included under the head of "accepted charges," is not sufficient evidence of a demand to set the statute running.

Before SEDGWICK, Ch. J., O'GORMAN, and INGRAHAM, JJ.

Decided April 9, 1883.

Appeal from a judgment entered September 4, 1882, against the defendant for \$4,855.08, and from an order denying a motion for a new trial on the judge's minutes.

Defendant's counsel moved at the close of plaintiff's case for a non-suit, on the ground that under the evidence in this case the claim appeared to be barred by the statute of limitations; which motion was denied; defendant excepted.

The facts and other exceptions appear in the opinion.

F. C. Bowman, for appellant.

Holmes & Adams, for respondent.—In the light of *Payne v. Gardner* (29 N. Y. 167–170) according to both the civil and the common law writers, this transaction was in every sense a "deposit." It is elementary that an action for a deposit with a banker does not accrue until formal demand. Under the law of this State, however, it is immaterial whether the bailee is a banker or not; the question in each case to be determined being whether the transaction is a loan or a deposit (*Payne v. Gardner*, 29 N. Y. 146; *Howell v. Adams*, 68 *Id.* 314, 321; *Boughton v. Flint*, 74 *Id.* 476, 482; *Munger v. Albany Bank*, 85 *Id.* 580). It rests upon the party claiming the benefit of the statute to show a demand (*Sullivan v. Fosdick* 10 *Hun*, 173).

The suit in Philadelphia was no demand against this defendant; he was never served with process in that suit; plaintiff does not claim that he even had notice of the suit. The joinder of his name as defendant in such a suit was

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brutum fulmen, for it is familiar law that the representatives of a deceased partner may not be sued for a partnership debt until the insolvency of the survivor has been established in a proper proceeding. The survivor and the representatives of the estate of the deceased partner are not jointly obligated on this certificate, and therefore a demand on the representatives of J. R. Fry is not even a constructive demand on this defendant (*Lawrence v. Trustees*, 2 *Den.* 577; *Troy Iron & Nail Factory v. Winslow*, 11 *Blatch.* 513; see also, *Bloodgood v. Bruen*, 8 *N. Y.* 362; *Jessop v. Millen*, 1 *Keyes*, 321).

BY THE COURT.—O'GORMAN, J.—The contention in the case is as to the liability of defendant as surviving partner of a Philadelphia firm, which was dissolved in 1864, on the following instrument. “Office of J. R. & H. B. FRY, Philadelphia, May 21, 1864. Due S. K. Ashton, M. D., Trustee, four thousand dollars, returnable on demand. It is understood that this sum is specially deposited with us, and is distinct from the other transactions with said Ashton. J. R. & H. B. FRY.”

In 1880, Ashton assigned his interest in all claims against defendant and said firm, to plaintiff. The defendant pleaded; (1) statute of limitations; (2) the acceptance of a claim against one Stephen Coulter in full settlement of all Ashton's claims against the firm.

The firm carried on business in Philadelphia as stock brokers, and also received deposits payable on demand. The question as to the effect of the statute of limitations on the plaintiff's claim, depends, first on the nature of the instrument itself, whether it was a certificate of deposit, or a promissory note, and second, at what date the demand for payment was first made.

It is in evidence that in August, 1880, Ashton made demand on defendant for payment on this instrument, and that defendant then acknowledged the indebtedness, promised to pay, and even gave to Ashton certain mining stock which he desired Ashton to raise money on, as part pay-

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ment. Ashton took them, endeavored to dispose of them, found they had no market value, and returned them to defendant. There is no clear evidence as to any previous or other demand of defendant, for this money. In 1865, or 1866, Ashton furnished defendant with a written account of the transaction between the firm and him, in which account, under the head of "accepted charges," this sum of \$4,000 is charged against the firm. As far as appears, defendant acquiesced in the correctness of that charge. In 1869, Ashton brought a suit in Philadelphia, in which Cornelia Fry, executrix of J. R. Fry, deceased, and the defendant here, Horace B. Fry, lately trading as "J. R. and H. B. Fry," were named as defendants. The defendant, however, was not served with any papers in this action. It is not proved that the claim now in suit was included in that action, although in a letter written to defendant by Ashton, in July, 1880, Ashton referring to the instrument now in suit writes: "The paper you gave me is in your handwriting—suit was begun against you for the deposit as being a trust deposit," etc. Plaintiff, however, in a subsequent conversation, told the defendant that he had brought the suit against the executrix, but that he, defendant, had not been served. Frequent conversations had taken place between defendant and Ashton about the state of the accounts between the firm and Ashton, and various abortive attempts at settlement had been made.

There is no force in the argument on the part of the defendant, that the instrument in evidence can be regarded as an ordinary promissory note payable on demand, and due when made. The case of *Wheeler v. Warner* (47 N. Y. 520), cited in support of that position, is not in point.

The instrument here proved is a certificate, and written evidence of a deposit of \$4,000, with the defendant's firm as bankers "*pro hac vice*," and no indebtedness arose by reason of such deposit, until demand of return of the amount deposited, and the statute of limitations did not begin to run until demand (*Payne v. Gardner*, 29 N. Y. 146; *Howell*

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v. Adams, 68 *Id.* 314, 321; Boughton v. Flint, 74 *Id.* 476, 482).

Unless, therefore, it appeared by competent evidence that a demand was made, other and earlier than that of 1880, the defense depending on the statute of limitations is disposed of. There is no proof of any such demand. There is no sufficient evidence to prove that Ashton ever accepted from the defendant any assignment of property or consideration in full settlement of Ashton's claim, for the money in suit, or in any way released the claim.

The only remaining question then, is whether the learned trial judge erred in the exclusion of material and relevant evidence, or erred in his charge to the jury. The evidence excluded by the court could only have gone to show that the claim here in suit was included in the action brought by Ashton against the executrixes of the defendant's deceased partners in 1869. But, as the defendant was not made a party to that litigation by service of papers upon him, the admission of such testimony would not properly have been evidence against him.

With these views of the law and the facts, as they appear in this case, we see no substantial error in the charge of the learned trial judge, and no force in the exceptions thereto. The judgment should be affirmed, with costs, and the order appealed from affirmed with \$10 costs.

SEDGWICK, Ch. J., and INGRAHAM, J., concurred.

SAMUEL L. SOLOMON, APPELLANT, v. DONALD
McKAY, AS PRESIDENT OF THE N. Y. STOCK
EXCHANGE, RESPONDENT.

Bill of particulars—when not allowed as to allegation of "obvious fraud."

The complaint alleged that plaintiff was expelled from the New York Stock Exchange and deprived of his valuable rights as a member thereof, without any violation on his part of the rules of the association. The answer alleged that the said Stock Exchange is a voluntary unincorporated

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association having a constitution, etc., to which plaintiff pledged himself on becoming a member, and which provides that any member guilty of "obvious fraud," of which the governing committee shall be the judge, shall, on conviction be expelled, and his seat escheat to said exchange. *Held*, not a case in which defendant was entitled to a bill of particulars of the fraud alleged.

Before O'GORMAN and INGRAHAM, JJ.

Decided April 9, 1883.

Appeal from an order of special term denying a motion made on behalf of the plaintiff for a bill of particulars of the "obvious fraud" alleged in the defendant's answer.

The facts appear in the opinion.

C. E. Davison, for appellant.

Scudder & Carter, for respondent.

BY THE COURT.—O'GORMAN, J.—The plaintiff claims in his complaint to have been expelled by the defendant and the other officers of the New York Stock Exchange, and deprived of his valuable rights as a member, without any violation, on his part, of the rules of that association. The defendant answers that the New York Stock Exchange is a voluntary unincorporated association having a constitution and by-laws for the government of its members; that the plaintiff on becoming a member pledged himself to abide by, and agreed in the said constitution; and that it is provided by Article XX. of said constitution, that any member guilty of "obvious fraud," of which the Governing Committee shall be judge, shall, on conviction, be expelled, and his membership shall escheat to the Stock Exchange Association.

The defendant, as president of the Stock Exchange Association, resists this motion for a bill of particulars of the specific offenses charged against the plaintiff, as constituting "obvious fraud," not because of any merely technical objection to that particular remedy, but because the subject of the inquiry is immaterial and irrelevant to the issue made on the pleadings, which is only, whether or not the plaintiff has been regularly expelled from the association in accordance with its constitution, and defendant claims, that

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if the plaintiff were so expelled, the decision of the "Governing Committee" thereon is *res adjudicata*, which plaintiff is precluded from going behind, unless the adjudication be first set aside in some proper manner. In support of this proposition, the learned counsel of the defendant cites, with other cases, *White v. Brownell* (3 Abb. Pr. N.S. 318; S. C., 4 Id. 194).

The defendant's objection goes to the foundation and essence of this action, and involves important questions as to the powers of such voluntary associations over the rights of the associates and their pecuniary interests in the property of the association, which should more properly be discussed and determined when the case comes up for trial, than on an appeal from an order.

It is enough for the present to say that on the pleadings, as they now stand, and on the facts which they disclose, the issue is as claimed by the defendant; that the order appealed from was within the discretion of the learned judge at special term to grant or to deny, and that we believe that his discretion, in this instance, was properly exercised; and that this is not a case in which a bill of particulars should be ordered.

The order appealed from is affirmed, with \$10 costs.

INGRAHAM, J., concurred.

WILLIAM S. WILLIAMS, RESPONDENT, v. THE
WESTERN UNION TELEGRAPH COMPANY,
IMPLEADED, APPELLANT.

Injunction pendente lite against the doing acts based on an act done, which is illegal as contravening a positive statute.

1. DISSOLUTION OF, NOT GRANTED, EITHER BECAUSE

The plaintiff's pecuniary interest is small,

or because

the injunction will afford him but little protection or relief, or the denial of it inflicts on him but little injury,

or because

persons through the act done, have *bona fide* acquired rights, and an

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interest in having the acts done which are sought to be restrained,
or because
the statute violated by the doing of the act done has prescribed the
appropriate and only remedy therefor,
or
for all these reasons combined.

2. ISSUE OF INJUNCTION IN SUCH CASE, WHAT SUFFICIENT GROUND FOR.
That the plaintiff has some pecuniary interest however small, in
having the acts restrained, and that the restraint may afford him
some protection or relief is sufficient.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 9, 1883.

Appeal from an order of the special term bearing date December 27, 1882, granting an injunction *pendente lite* against the payment of any dividend upon the \$15,526,590 of capital stock of the defendants, issued under a contract dated January 19, 1881, to the stockholders of the Western Union Telegraph Company, to represent, as was claimed, past accretions of earnings to the capital stock of the company.

The facts fully appear in the opinion.

Dillon & Swayne, attorneys, *A. J. Vanderpoel* and *Wager Swayne*, of counsel for appellant, made the following points:—I. The decision of the general term in the first action was, not that the \$38,926,590 was “illegal” in the sense of “absolutely void,” as alleged in this (2d) action. On the contrary, that court proceeds on the assumption that the entire \$80,000,000 of shares were of lawful and valid creation, and finds merely that of that sum \$15,526,590 were distributed in contravention of the statute above cited.

II. The shares in question being of valid creation, to distribute them as was done was unlawful only in so far as it was in contravention of the statute.

III. The statute which has been adjudged to inhibit the distribution of the shares in question is a statute creating a new right and prescribing its remedy. The shares affected by this order were lawfully paid out, except so far as paid in contravention of this statute. The statute, therefore, as

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to such a payment, created a new right of restraint. It fixed at the same time the penalty for violation of that right. In such a case the proprietor of the right is confined to the remedy established by the statute. He can have no relief in equity.

IV. The whole transaction complained of being lawful in all respects, except so far as involved with the statute above mentioned, the plaintiff has no right to an injunction against dividends, irrespective of the view that the remedy provided by the statute is exclusive.

V. The holders of the stock, the real parties of interest, are not before the court.

VI. The presumption is that the holders of all certificates are *bona fide* holders.

VII. Irrespective of all the foregoing positions, the rules of equity do not sustain, upon the pleadings and proofs in this case, an error such as has been made. 1. It has not escaped the attention of the court that mere payment of these dividends, being at most a mere payment of money without warrant of law, cannot possibly amount to a breach of any peremptory statute, but could only be restrained, if at all, under some common rule of equity. In this connection the fact is here significant that plaintiff has no standing in equity. That he cannot be heard, for any merit of his own in any court requiring honesty of suitors, is fully recognized in the opinion at general term on which the order appealed from is based. The court thereupon plants its decision expressly upon the ground that complainant has demonstrated an intended breach of a peremptory clause of the revised statutes. In such a case, it declares, a court of equity interferes, not for the sake of the parties but for the sake of the law, and irrespective of the source whence the disclosure came. The law in question, however, relates expressly to dividends from capital and not from profits. The dividends now enjoined are confessedly and undeniably from surplus profits, and to these the law has no possible application. The situation therefore is that the plaintiff having no right, and there being no public policy in-

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volved, there remains no ground whatever for the action of the court. 2. Not only is there here no breach of a peremptory statute ; this distribution of the dividends is only what the plainest equity requires. The contract of January 19, 1881, is now completely executed. The stock agreed to be paid for the properties then purchased is delivered. If dividends were cut off from the shares affected by this order, and were equally declared upon the rest, the spirit of the contract would be violated. The vendees in that contract were to share in dividends on \$80,000,000, and not in larger dividends on \$61,000,000. The dividend upon the shares affected by this order goes exclusively to the vendors in that agreement, or to their assigns, for it was to them only, those who held Western Union shares before the increase, that the shares affected by the order now appealed from were distributed. The effect is the same as if a dividend had been declared upon the \$65,000,000 only, and an additional dividend declared on the original \$41,000,000. The holders of the rest could not complain, for that is the effect of what they agreed to in the contract. Those who held the \$41,000,000, of course would not complain, and could not be heard if they did, for they received not injury but benefit. The plaintiff complains, it is true, but he is like the man who having from Jove the promise of his wish, having learned that his neighbor was promised just twice what himself should wish for, wished one of his eyes put out, that his neighbor might be blind. That is hardly a case that commends itself to a court of conscience. "Conscience never resisteth the law, nor addeth to it, but only when the law is directly in itself against the law of God, or law of reason" (*Doctor and Student*). 3. Reduced to the last analysis, the action enjoined is simply the payment of a sum of money. It is payable to persons of whom the greater number have probably, as transferees, an incontestable right to it. There is no order restraining transfers, and therefore nothing to prevent the whole of this \$15,000,000 from being sold to-morrow in the market, and to *bona fide* purchasers. To forbid payment generally, would be,

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as has been said, as to such purchasers, a lawless injury to persons not before the court. To forbid payment upon those of the shares which may be still in first hands, while transfers are freely allowed, would be an idle thing. 4. Even aside from these considerations, and regarded as misapplication, pure and simple, the proposed payment is mere waste. As a mere money payment, it is capable of full and certain compensation. It is not properly within the scope of equity till shown to be irreparable, or else beyond efficient remedy at law. Averments of fraud were, in the main case, the staple of complaint. On the trial they were not only disproved, but disclaimed. No pretense is made of irresponsibility of parties, or of inadequacy of the remedy at law. At most, it is a mere remediable waste (1 *High on Injunc.* § 699; *T. & B. R. R. Co. v. B., H. T. & W. R. R.*, 86 *N. Y.* 126, 127.

The above points were supported by an elaborate argument.

John Sessions, attorney, and *Robert Sewell*, of counsel, for respondent.

BY THE COURT.—O'GORMAN, J.—This litigation has presented itself in so many different shapes, and has, in its various stages and aspects, so frequently received the attention of this court, that a brief statement of the questions that have been heretofore considered and passed upon, is necessary in order to understand the present condition of this action and the precise questions involved in this appeal.

This action was begun on or about December 14, 1882.

It was brought by the plaintiff, as a stockholder in the Western Union Telegraph Company, in behalf of himself and all other stockholders in said company similarly situated, who might join him in the action and be made parties plaintiff therein.

The chief equitable relief sought, as set forth in the prayer of the complaint, was that the Western Union Telegraph Company should be forever restrained from paying any dividend upon \$38,926,590 of stock of that company,

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claimed to have been illegally issued, under provisions of a contract dated January 19, 1881, between that company and the Atlantic and Pacific Telegraph Company and the American Union Telegraph Company; and also that payment of the same *pendente lite* should be enjoined.

The purpose of the contract in question was the acquisition by the defendants, the Western Union Telegraph Company, of all the property of the two other telegraph companies.

It provided, among other things, that the Western Union Telegraph Company, the defendants, should give in payment to the American Union Telegraph Company for all its property, franchises, &c., except the franchise to be a corporation, 150,000 shares of the capital stock of the Western Union Telegraph Company of the par value of \$100 each, to be issued and to be exchanged for shares of the American Union Telegraph Company, as in said contract provided for, and should give in payment to the Atlantic and Pacific Telegraph Company, for all its property, franchises, &c., except the franchise to be a corporation, 8,400 shares of the capital stock of the Western Union Telegraph Company, the same to be issued and to be exchanged for shares of the Atlantic and Pacific Telegraph Company, as also in said contract provided.

The contract further provided that the Western Union Telegraph Company should cause its capital stock to be increased to the sum of \$80,000,000 by an addition of \$38,926,590, represented by shares of capital stock of \$100 each—\$15,526,590 in shares of said capital stock to be issued and delivered to the then holders of its shares, the said shares being thus issued to represent its investment of earnings in the purchase, construction and equipment of additional line wire and general plant since the first day of July, 1866.

The plaintiff in his complaint goes on to state that, in pursuance of said contract, the defendant company had caused its capital stock to be increased to the sum of \$80,000,000, and had issued of such increased capital stock

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to the stockholders of the American Telegraph Company, \$15,000,000; to the Atlantic and Pacific Telegraph Company, \$8,400,000 of said increased capital stock; and had also issued \$15,526,590 of said increased capital stock to the holders of its own shares; and these issues of stock the plaintiff claims, in his complaint, to have been without authority of law and absolutely void

Plaintiff further avers, that the defendant corporation had distributed the stock so issued among stock brokers; that said stock had been dealt in publicly—transferred from time to time since its issue—and is now outstanding to the amount of \$38,926,590, that the defendant company has paid dividends at the rate of $1\frac{1}{4}$ per cent. per quarter, as well on this stock which plaintiff claims to have been illegally issued, as on its other and lawfully issued stock, and that the directors of the defendant corporation had declared such a dividend payable on January 15, 1882, that they threatened to anticipate that date of payment, unless restrained by the court, to the irremediable injury of the plaintiff and all the lawful stockholders in said defendant corporation, and that these things had been done, although the superior court, in a previous action brought to prevent the consummation of said contract, begun on February 12, 1881, had declared such issue to be illegal, and said contract to be void.

Immediately on the commencement of this present action, the plaintiff moved for an injunction restraining the defendants *pendente lite* from paying any dividend on any of the said \$15,526,590 of capital stock heretofore divided between the stockholders of the company, or of the said \$23,400,000 capital stock issued and distributed to the stockholders of the American Union, and Atlantic and Pacific Telegraph Companies.

This motion, on which the order was granted, which is the subject of this appeal, was heard at special term of this court, on December 26, 1882, and defendants used on the motion affidavits setting forth these facts, viz.: That on the trial of the said previous action, which was had before

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Judge TRUAX, without a jury, it was found that the above mentioned contract, and the acts of the defendants, and of its officers and directors in furtherance of the same, were lawful and valid ; that since that decision the entire \$80,000,000 of the capital stock of said Western Union Telegraph Company had been issued, with the exception of about 700 shares, and had passed into the hands of a large number of persons ; that if the payment of dividends thereon were prevented, great loss would result from depreciation of the stock of the defendant company in the markets of the world ; that it was impossible to distinguish the shares of stock which form part of the increase made in 1881 from the shares of capital stock which had been previously issued ; and that it was impossible to restore the stockholders of the defendant company to the condition in which they were, at or prior to said increase of capital stock ; that by reason of the many transfers, the different kinds of stock had been so mingled as to be wholly undistinguishable, in respect to the circumstances of its issue, or the persons to whom it had been originally issued.

The defendants also set forth, as part of their case on the motion, the findings of Judge TRUAX on the trial of that action, which resulted in his dismissing the plaintiff's complaint on the merits and vacating an order of injunction, *pendente lite* thereupon made in that action.

The learned judge found among other things, as matters of fact :

That the property, franchises, &c., of the American Union Telegraph Company were fully and fairly worth, on January 19, 1881, the sum of \$15,000,000 ; that the property, franchises, &c., of the Atlantic and Pacific Telegraph Company were fully and fairly worth, on that day, \$8,400,000 ; that the actual value of the investments of surplus earnings of the Western Union Telegraph Company as they existed on January 19, 1881, was more than the sum of \$15,526,590 ; that the investment of such surplus property had been, from time to time, reported to the stockholders of the Western Union Telegraph Company, and approved

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by them, and no one of the stockholders had ever dissented therefrom ; that at a meeting of the directors of the Western Union Telegraph Company, held on March 26, 1881, they affirmed and redeclared a dividend as of January 19, 1881, on the amount of \$15,526,590, payable to the stockholders of the defendant corporation in certificates of stock.

From the judgment entered on these findings, the plaintiff appealed to the general term of this court, and that appeal was decided on November 6, 1882, by the reversal of the judgment and the order that a new trial should be had.*

Written opinions were delivered by FREEDMAN, Presiding Judge, and by Judge ARNOUX ; Judge RUSSELL concurring with Judge FREEDMAN.

For the purposes of that appeal Judge FREEDMAN accepted the facts as found by the learned trial judge, and held: .

That the individual share holders could not insist on a dividend in cash of the earnings of the company which were invested in property, because they had approved the investment:

That the shareholders who had consented to that investment had consented to turn earnings into capital stock.

That the acts of the defendant complained of had all occurred before plaintiff had acquired title to the stock by purchase.

Taking the facts as found by the learned trial judge, and also considering the large powers granted to telegraph companies by the Legislature of this State, Judge FREEDMAN regarded the appeal then under the consideration of the general term, as presenting only the naked question of law, whether the agreement of January 19, 1881, was contrary to law.

He held, that the power of the Western Union Telegraph Company to create and issue to the two other telegraph companies, stock in payment for their lines, could not be disputed.

* See 48 *Super. Ct.* 849.

The distribution of the \$15,526,590 capital stock among the shareholders of the Western Union Telegraph Company, however, and the payment of dividends thereon, he held to be without consideration and wholly illegal, as violating the following provision of law:

“It shall not be lawful for the directors or managers of any incorporated company in this State to make dividends, excepting from the surplus profits arising from the business of such corporation; and it shall not be lawful for the directors or managers of any such company to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of such corporation, or to reduce the capital stock without the consent of the Legislature” (2 *Rev. Stat.* [6 ed.] 398).

As this illegality entered into and permeated the agreement of January 19, 1881, the agreement itself could not be sustained; and that as the case then stood, the plaintiff was entitled to an adjudication declaring the illegality of the agreement of January 19, 1881, and enjoining the distribution of the \$15,526,590 of stock.

The earnings or surplus profits which with the assent of the stockholders, had been from time to time used and absorbed in the business of the corporation, the learned judge held to be no longer profits, but to have become capital stock, and as such subject to the prohibition of the statute.

The judgment of the special term in that action was therefore reversed, and a new trial ordered.

In that decision the general term was unanimous, and by that decision, unless it be reversed by a higher tribunal, or unless new facts appearing in the present action present different questions of law, this court holds itself bound.

The order of the special term, here appealed from, enjoined only the payment of dividends on the \$15,526,590 shares of capital stock issued and distributed among the shareholders, before the decision of the general term on November 6, 1882, above referred to, and claimed to represent past accretions of earnings to the capital of the company.

Of these shares, as has been shown above, all but 700

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had been issued and distributed, and with that issue, the injunction order now appealed from has no concern.

The plaintiff alleged in his complaint, that dividends to a large amount have already been paid to the stockholders on the whole amount of stock issued under the agreement of January 19, 1881, at the rate of $1\frac{1}{2}$ per cent.; that the amount of dividends so paid amounted to \$4,087,291.95; and he demanded judgment that payments of such dividends, so far as illegally issued, should be restrained during the pending of the action.

On a resettlement of the order, and it appearing to the court that the said stock to the amount of \$5,526,590 had been issued by the defendants, except about 700 shares, the court ordered that, upon the defendants giving bonds conditioned, as in the order set forth, the defendants might have leave to pay the dividends on said \$5,526,590, declared by the directors of the defendant company on December 1882, in respect to such of said stock as the defendants are unable to separate from the balance of the stock of the defendant corporation, such provision not to apply to any of said stock which remains in the hands of the parties to whom said shares were originally issued, or shares, the title to which is known to be derived from such parties.

The force and effect of this injunction are thus circumscribed and limited; and it remains for this court now to decide, bearing in mind the former decision of its general term, whether the learned judge in granting this order has erred.

The court at general term then held that the issue of shares of capital stock to the stockholders of the Western Union Telegraph Company was a violation of the statute law of the State. The payment of dividends on such unlawfully issued stock is also illegal.

The plaintiff must be regarded in this action as asserting only his own individual rights, as owner of 200 shares of capital stock and entitled to equitable relief, only so far as these rights are invaded or threatened with invasion, and because of the pecuniary loss which he may sustain there-

from. But no matter how small his pecuniary interest may be, it is entitled to protection from the court. It may well be, that the granting of this injunction could, under the peculiar circumstances of this case, afford him but little protection or relief, and the denying of it could inflict on him but little injury.

These, however, are not questions with which the court has any legitimate concern. Its only duty is to see that the law be properly applied to the protection of the legal and equitable rights of the parties in this case.

Neither is the fact that these unlawfully issued shares may have reached the hands of some *bona fide* holders, to be regarded as affecting the question. If their rights are invaded, they must seek such legal remedy or relief, as on the facts of each case, they may be found to be entitled to.

It is also urged on the part of the defendants, that the statute, the provisions of which are claimed to have been violated by the issue of the said shares of stock to stockholders of the defendant corporation, has, in creating the offense, also prescribed the appropriate and only remedy, by providing that the directors assenting to the wrongful act, shall be jointly and severally liable to the corporation and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock of said company illegally issued:

This argument does not seem to us conclusive on this appeal.

The principal of law invoked in its support may confine the remedy for the wrong, when committed, to that provided in the act, but it does not, in our opinion, limit or impair the powers of a court of equity to restrain *pendente lite* the commission of the illegal act, while it is threatened, or inchoate, or incomplete.

The material facts now under consideration are the same as those before the general term in the former action.

The granting or denying the order of injunction, now appealed from, was within the judicial discretion of the court at special term; and if the order was, as we believe it

Statement of the Case.

was, in accord with the decision of the general term and was the logical consequence of that decision, this court feels bound to sustain it.

The order appealed from is therefore affirmed, with \$10 costs.

SEDGWICK, Ch. J., concurs ; INGRAHAM, J., dissents.

FANNIE WOTHERSPOON, AS EXECUTRIX, &C.,
RESPONDENT, v. GEORGE WOTHERSPOON,
APPELLANT.

Partnership—accounts—individual liability of partner, evidence of.—Non-joinder, waiver of.—Domestic relations.

In 1867 plaintiff's testator was credited upon the books of W. & Co. upon the direction of the defendant W., who was a member of said firm, with the sum of \$10,000, and thereafter his account was regularly kept on said books, and from time to time accounts current were rendered to him, showing the amount due him, including percentage of profits, etc., each account beginning with the balance carried forward from the preceding account, during which time several changes were made in the membership of said firm. In 1880, defendant, having associated with him other partners, and being the only member of the original firm remaining in the business of W. & Co., was applied to for a statement of the account of plaintiff's testator; and he rendered a statement entitled as an account of W. & Co. with plaintiff's testator, which carried forward the balance of the preceding account and which also contained charges for moneys purporting to have been paid by defendant individually for the use of plaintiff's testator.

Held, in an action against defendant individually to recover the balance appearing on said account which was alleged to have been received by him and wrongfully detained from plaintiff's testator—that the admission in the said account was the admission of defendant individually, that the amount therein named was in his hands. *Further held*, that such an admission must be taken by one seeking to recover on it in its entirety, and as it stands, allowing all debits and credits.

SEDGWICK, Ch. J., dissenting, holds upon a review of the evidence, that the judgment for plaintiff cannot be upheld, for the reason that it does not rest upon any cause of action stated in the complaint and supported

Respondent's Points.

by the testimony, or upon any cause of action stated in the findings of fact; that the evidence was not sufficient to show that plaintiff's testator was a member of the original firm of W. & Co., which fact was necessary to uphold the cause of action stated in the complaint.

In an action against a member of a firm, the objection that the other partners are not joined as parties, will be deemed waived, if not taken advantage of by answer or demurrer.

An agreement to pay for board will not be implied where a son and his family are living with the son's father.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 9, 1883.

Appeal from a judgment in favor of the plaintiff for \$8,934.68. The action was tried by Judge TRUAX, without a jury. The facts are stated by the court.

J. P. Kingsford and Stephen P. Nash, for appellant.

Tracy, Olmstead & Tracy, for respondent.—The answer stated no objection for defect of parties. The denial, therefore, that defendant did not alone constitute the firm of "Wotherspoon & Co." was immaterial (*Kingsland v. Braisted*, 2 *Lans.* 17; *Code*, §§ 498, 9; *Wigand v. Sickel*, 3 *Keyes*, 120). It appeared that the \$10,000 which defendant by his answer alleged he had "placed to the credit of" plaintiff's decedent, was credited to said James Wotherspoon, in the "account current" for 1867, under the date of 5th of March, and that the balance of each year's "account current" was carried forward to the next year, and that the "account current" annexed to the complaint, began with such a balance at James Wotherspoon's credit on the 2d January, 1879, of \$9,841.23, and which balance was proved to be correct. The case, as proved by plaintiff, therefore, fell within the rule laid down in *Stephens v. Waite* (10 *N. Y. W. D.* 421).

The action was not for an accounting as between partners, but was for the recovery of a sum of money which an account, as rendered by defendant, showed to be due to plaintiff's decedent.

The \$10,000 item was credited in an "account current," as so much money placed to the credit of James Wother-

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spoon, and the testimony was that "it was given to him to be placed in the concern." There was no proof whatever of a revocation of any such alleged gift, but, on the contrary, it did appear that if the transaction was a gift, the gift was executed. Not only were the amounts credited to James Wotherspoon upon the firm's books, but accounts containing such items as having been actually passed to his credit were rendered by the defendant, prepared under his direction.

The defendant's counter-claim for the value of the board and lodging of his son in his own house was properly disallowed. It was inconsistent with his defense, that the money was due from "Wotherspoon & Co." The evidence showed clearly that it was at defendant's own request that his son and his son's family lived in his house, and that plaintiff herself rendered an equivalent in her own services. In such a case the ordinary presumption of a *quantum meruit* does not obtain (*Williams v. Hutchinson*, 3 *N. Y.* 312; *Sharp v. Cropsey*, 11 *Barb.* 324; *Elliot v. Gibbons*, 30 *Id.* 498).

BY THE COURT.—O'GORMAN, J.—The plaintiff is the widow and executrix of James Wotherspoon, a son of the defendant, who died May 2, 1881; and the action is brought by her as such executrix to recover from the defendant the said sum as being money which belonged to her testator and received by the defendant and wrongfully detained by him. Before May 1, 1866, the deceased had been a clerk in the employment of the firm of "Wotherspoon & Co.," which then consisted of George Wotherspoon, D. A. McTavish and D. O. Wotherspoon, as partners. On that day a memorandum was signed by them, of which the following is a copy:

"MEMORANDUM.—From the first of May, 1866, the following are the shares of the respective partners of the firm of Wotherspoon & Co., of the net profits of the business, all expenses, salaries and subsidiary allowances being first deducted: D. A. McTavish and D. O. Wotherspoon to

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receive one-fourth each and George Wotherspoon one-half.

“New York, 17th May, 1866.

(Signed)

G. WOTHERSPOON,
D. A. McTAVISH,
D. O. WOTHERSPOON.

“Allowance to James Wotherspoon, \$2,000 per annum, and 5 per cent. of net profits.”

On March 5, 1867, the deceased James Wotherspoon married the plaintiff, and on the same day he was, by direction of the defendant, credited on the books of the said firm with the sum of \$10,000 to be placed in the concern of Wotherspoon & Co. Soon afterward, the deceased became incapacitated, by reason of illness, from rendering any service to the firm, and in 1872 he and his wife went to Europe, where they remained until June, 1874. They then returned and took up their abode with the defendant, who occupied a house on Staten Island. The deceased had become paralyzed and imbecile, and so remained until his death, which occurred on May 2, 1881. From the time of his return he and his wife and children continued (with the exception of a few months), to reside in the house of defendant.

In 1870, McTavish, and in 1872, D. O. Wotherspoon left the firm of Wotherspoon & Co. From 1872 to 1876, the business was carried on by defendant alone. In 1880, the firm was composed of George Wotherspoon and F. W. Scherr, the latter having been a partner since May, 1876. He left the firm on December 6, 1880. From December 6, 1880, to January 1, 1881, the firm was composed of George Wotherspoon alone, when Mr. Allien went in with him.

From the time of the signing of the memorandum above set forth, regular accounts were kept on the books of Wotherspoon & Co., between that firm and the deceased, and copies thereof were regularly rendered to him. In the first of these accounts so rendered, deceased is credited with said sum of \$10,000 cash, under date of March 5, 1867, with interest thereon, \$403.96—with salary \$2,000—with 5 per cent. from net profit \$2,417.60, and with a balance in

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his favor of \$10,166.46 on January 1, 1868. Further accounts are in evidence, carrying on this balance crediting the deceased with interest on the balances in his favor, and for sums due to him as his percentage of the net profits, debiting him with various sums paid on his account, and showing a balance in favor of the deceased on January 1, 1875, of \$12,653.70. After January 1, 1869, no amount was credited to the deceased on account of allowance, but his percentage of the net profits was increased from 5 to 15 per cent. These accounts passed through defendant's hands, and were prepared by his direction and their correctness testified to by Scherr, the book-keeper of the firm, who became a partner in May, 1876.

About July, 1880, a year before her husband's death, the plaintiff applied to the defendant for a settlement of accounts, and received from the defendant an account in writing purporting to show the pecuniary relations between her husband and the firm of "Wotherspoon & Co.," on April 30, 1880. This account shows a balance in favor of deceased on that date, of \$7,300.50, after charging him with various sums of money—including \$1,600 under the head of "house expenses per G. W." and this entry is dated April 30, 1880. The plaintiff alleges in her complaint that "having no means of verifying said account, and being informed that the books of said firm had been destroyed, she is willing to accept the said account as correct, except as to the sum of \$1,000 charged there on April 30, 1880, for "house expenses for G. W.," which sum plaintiff states on information and belief should not be charged in said account, and is not a proper and valid charge or claim against the estate of said James Wotherspoon. This charge of \$1,600 was a subject of discussion, from time to time, between plaintiff and defendant, until October, 1880, when she proposed to remove her husband from the defendant's house, and herself to return to her parents, to which defendant objected and said they had better go on as they were till spring. Afterwards, about March or April, 1881, she received from defendant a further account in writing

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as between Wotherspoon & Co., and James Wotherspoon, carrying forward the last balance, \$7,300.51—charging against said James Wotherspoon various further sums for expenses incurred by her after the date of the former account, and including one other charge under the head of “deducted proportion of bad debt in 1868, 5 per cent. on \$20,000 and interest \$700—\$1,700,” and reducing the balance in favor of the deceased on December 31, 1880, to \$4,606.84. No evidence, however, was offered to substantiate the last charge.

It is in evidence that the plaintiff took care and management of defendant's establishment and kept house for him, a service which perhaps he needed, being a man between eighty-five and eighty-six years of age.

The learned trial judge disallowed this charge of \$1,600 for “house expenses,” set forth in the account dated April 30, 1880, but allowed a charge of \$1,285.67, being for moneys expended for the plaintiff and family, after April 30, 1880, and found a balance due to her, as executrix of her deceased husband, by defendant, of \$8,443.89, and being in the defendant's hands on April 30, 1880.

At the close of the plaintiff's case, the defendant moved for a dismissal of the complaint on the ground, among others, that plaintiff's claim should have been made against the partners comprising the firm of “Wotherspoon & Co.” at the time of the beginning of the accounts; and that there was no proof of any individual liability on the part of the defendant, George Wotherspoon, in favor of the plaintiff's testator, and also because the accounts produced were rendered by the said firm, and are not sufficient evidence to charge the defendant individually with the balance appearing therein. Defendant also claimed that the amounts placed to the credit of said James Wotherspoon on the books of the firm of “Wotherspoon & Co.” by direction of the defendant, were never reduced to possession by said James Wotherspoon, and said amounts were never transferred to him; and that, as between the defendant and said James Wotherspoon, there was not a valid

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gift of said amounts. Defendant also claimed that he was entitled to charge the estate of James Wotherspoon for his board and lodging for six years preceding his death, as a counter-claim in this action.

This is an action for money of the plaintiff's testator received by the defendant as a member of and representing the firm of Wotherspoon & Co., and wrongfully retained by him, and the question is whether there is sufficient evidence on which that charge can be sustained.

As far as the firm of Wotherspoon & Co. is concerned, their accounts rendered from time to time are sufficient admission that they recognized the right of James Wotherspoon to have credit for \$10,000, as deposited in his name in the concern—for interest on the same from year to year—and credit also on the other sums regularly entered in the books of the firm for his percentage of the profits. These accounts showed a balance in his favor on January 1, 1875, of \$12,653.70.

The account rendered by the defendant on behalf of Wotherspoon & Co., and in their name, to the plaintiff, in July, 1880, showed a balance in favor of her testator on April 30, 1880, amounting to \$7,300.51. This is an admission on the part of the defendant as a member of that firm, that he held that amount of the testator's money in his hands.

It is alleged in the complaint that he was the only member of the firm, which was carried on by himself alone, at the time of the commencement of the action. But if that were otherwise, and there were in fact other members of the firm who should have been joined as defendants, yet that objection must be deemed to have been waived by reason of the failure of the defendant to take advantage of it either by demurrer or by answer (Code, §§ 498, 499 ; *Kingsland v. Braisted*, 2 *Lans.* 17).

But apart from that waiver of the objection, there are other reasons for holding that the accounts rendered by or in the name of the firm bind the defendant as fully as if they were rendered in his own name. When in June, 1881, he received letters from the plaintiff inquiring about the

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state of her husband's accounts, none of the persons who had been partners when the account between James Wotherspoon and "Wotherspoon & Co." was opened, had any connection with that firm; one of them had left it in 1870, and the other in 1872, and there is no evidence that they retained any interest in the firm or were liable for its transactions. From 1872 to 1876, the defendant had carried on the business alone; Scherr joined the concern in 1876, and left it in December, 1880; and Allien, who had been its book-keeper, seems to have become a partner in January, 1881. Under these circumstances, and in answer to plaintiff's request, an account is furnished to her, entitled: "Mr. James Wotherspoon, in account with Wotherspoon & Co.," commencing on the credit side with an entry of a balance in his favor of \$9,841.23, and closing with a credit in his favor, "By balance carried forward to new account, \$7,300.51." In this account James Wotherspoon is debited with "House expenses per G. W., \$1,600," and if the firm name of "Wotherspoon & Co." therein, represented any persons or person other than the defendant, this entry, purporting to be an entry of moneys paid out by him individually for the use of James Wotherspoon, would have been out of place, and wholly inconsistent with the argument of the defense, that "Wotherspoon & Co.," and the defendant, George Wotherspoon, were two separate and distinct entities.

The allegation in the complaint that the "former partners had, on their withdrawal from the firm, respectively settled with defendant, so that he was to retain the assets and business of the firm, including the capital and money of James Wotherspoon, and the profits belonging to him," is not in the answer distinctly or definitely denied, and there was, in my opinion, enough to warrant the trial judge in inferring, that for all purposes of this action, the defendant and "Wotherspoon & Co." were one and the same, and that the money of James Wotherspoon, \$7,300.51, admitted to be in the hands of that firm to the credit of James Wotherspoon on April 30, 1880, was in fact in the hands

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of the defendant, and that the admission in the account of "Wotherspoon & Co," was in fact and in law the admission of the defendant.

The plaintiff's claim then rests wholly on the account rendered by the defendant as of April, 1880, and the admission of the balance therein set forth in favor of testator. But that admission, she must take in its entirety, and accept it as it stands, allowing all debits as well as credits, including the charge of \$1,600 for "household expenses."

There is no claim on the part of the defendant that the account rendered as of April 30, 1880, was in any way incorrect; on the contrary, the balance therein, in favor of testator, of \$7,300.51, is carried into a later account furnished by defendant, containing entries up to December 31, 1880. This account must be regarded as conclusive and binding on the defendant (*Harley v. Eleventh Ward Bank*, 76 N. Y. 618).

As to the later account, plaintiff admitted all charges on the debit side for payments made after date of the former account, April 30, 1880, and they are all charged against her in the findings of fact, excepting the charge of \$1,700 for an alleged bad debt in 1868, which charge the plaintiff disputed, and in proof of which no evidence was offered.

In this view of the case, the claim on the part of the defendant that the sums entered by his direction on the books of the firm to the credit of James Wotherspoon are not an executed or valid gift or received into possession, becomes unimportant, especially when coupled with the allegation in defendant's answer, that the sum of \$10,000 first put to his credit had in fact been spent for his benefit.

As to the claim set up on the part of defendant by way of counter-claim, on account of board, &c., of the testator, it was properly disallowed. There was no evidence of any agreement on the subject, and the mutual relations and obligations of the parties between one another would, in the absence of an agreement, lead to the presumption that

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no such charge had been contemplated (*Williams v. Hutchinson*, 3 *N. Y.* 312).

Except as to the disallowance of the charge of \$1,600, I see no error in the rulings of the trial judge

The judgment should therefore be reversed and a new trial ordered, unless plaintiff stipulates to deduct from the judgment the sum of \$1,600, and interest from April 30, 1880, in which case the judgment, as modified, should be affirmed without costs of this appeal.

INGRAHAM, J., concurred.

SEDGWICK, Ch. J.—(Dissenting.)—In differing with my learned associate, I am of opinion that, as a consequence of applying the ordinary tests, it will be found that the judgment appealed from does not rest upon any cause of action stated in the complaint and supported by the testimony, or upon any cause of action stated in the findings of fact.

The cause of action stated in the complaint, depends upon the averments that the plaintiff's testator was a partner in the firm of Wotherspoon & Co., and as such partner had a certain interest in the capital and profits of the business; that the defendant and certain other persons were, with the plaintiff's testator, the members of the firm; that these other persons left the firm, withdrawing their interests, after settling with the defendant; that thereafter the defendant continued the business, retaining the assets, including the capital and profits belonging to the plaintiff; that in the year 1880, the testator, then alive but unable to transact business, the plaintiff demanded from the defendant "an account of the amount of said moneys owing by him to said James Wotherspoon, and then in his possession, on account of the business of said firm, and that said defendant thereupon, on April 30, 1880, rendered and stated his account with the said James Wotherspoon of that date, and delivered the same to the plaintiff on behalf of said James Wotherspoon, a copy of which account is hereto annexed and forms part of this complaint, and in and by said account the defendant admitted himself to be

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indebted to the said James Wotherspoon on the firm account, at the last mentioned date, in the sum of \$7,300.51. That at the time said account was rendered, said James Wotherspoon was of weak and imbecile mind, and unable to transact any business, and plaintiff refused, on his behalf, to accept said account as correct and final, but the plaintiff having no means of verifying said account, and being informed that the books of said firm had been destroyed, is willing to accept said account as correct, except as to the sum of \$1,600, etc.”

It may be assumed, without discussion, I think, that an account in a book, or a statement of an account from a book, is not a chose in action in itself. It only contains statements or admissions, or evidence of facts. The facts, if they really exist, are the constituents of the cause of action. The account is but evidence of one kind, subject to explanation, qualification or contradiction, as is any other kind of evidence. To make an account stated a substantive cause of action, it is necessary to allege and prove that the accounting was had concerning prior dealing ; *e. g.*, sums of money, before due and owing by defendant to plaintiff, and then in arrear and unpaid.

In the present case, the testimony showed that the testator had never been a partner, and the account delivered to the plaintiff did not show any amount due to the testator as a partner.

Among the findings of fact there is none that is equivalent to a finding that the testator had been a partner at any time. If there were, the testimony would not support it. The finding on this subject was, “that during the year 1867, and subsequently, the said James Wotherspoon was entitled to receive and did receive a share of the profits of the business so conducted by said defendant in said firm name, and that said defendant, from time to time during the year 1867, and subsequently, received and held divers sums of money belonging to said James Wotherspoon, consisting in part of amounts adjusted and paid to said James Wotherspoon as his said share of profits, and in part of other moneys belonging to said James Wothers-

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spoon, and that January 2, 1879, there was of such moneys of said James Wotherspoon in the hands of said defendant, the sum of \$9,841.23; that thereafter the defendant paid and expended for and on account of said James Wotherspoon, the several sums of money in that behalf mentioned in the statement thereof annexed to the complaint, except the item of April 30, 1880, of \$1,600, and that the said statement was rendered by defendant to said James Wotherspoon, as alleged in the complaint, and that the balance of said moneys in defendant's hand on April 30, 1880, was \$8,900.51." Not only is there here no finding that the plaintiff's testator had an interest as a partner, but there is no testimony to sustain what may be alleged to be facts, contained among the findings. There was no proof that the defendant received or held divers sums of money of the kind described by the findings. The testimony, in its most favorable aspect for plaintiff, showed that from time to time, although the testator was not a partner, certain portions of profits were credited to him. The profits had not been received for the testator, but for the firm. If he had any right to the portions credited to him, it could result only from some contract obligation on the part of the defendant, to pay him that portion of the profit. If the result was that he would be entitled to the portion, it would be an inference from the existence of the contract, and it would be necessary to find from the testimony that there was such a contract. The judge did not find that any such contract was made. On the contrary, he refused to find otherwise than he had already found in the findings already stated, in reply to a request of defendant's to find that a memorandum in James Wotherspoon's handwriting, marked "Exhibit K," shows the arrangement between him and the firm, and that there never was any other bargain or agreement than this. The memorandum was as follows:

"From the first May, 1866, the following are the shares of the respective partners of the firm of Wotherspoon & Co., of the net profits of the business, all expenses, salaries

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and subsidiary allowances being first deducted. D. A. McTavish and D. O. Wotherspoon to receive one-fourth each, and George Wotherspoon one-half.

“New York, 17 May, 1866. G. WOTHERSPOON,
D. A. MCTAVISH,
D. O. WOTHERSPOON.

“Allowance to James Wortherspoon, \$2,000 per annum, and 5 per cent. of net profits.”

There can be no doubt that this instrument was the original contract between the parties, but it is now referred to to emphasize the statement that the claims of the complaint were not supported by the evidence, and that the findings of fact do not state the cause of action claimed by the complaint, or, in my judgment, any other cause of action countenanced by the testimony.

In what way then can the judgment be sustained? Only by looking through the evidence to find whether there are pieces of testimony which might support an action; for instance, inferences that might be drawn from the accounts that were handed by defendant to plaintiff. In view of all the testimony, it would seem to me, if it were right to pass upon the question, that the only obligation that ever existed between the defendant's firm and the testator arose out of an employment of the latter, upon the terms, originally as stated in the memorandum that has been referred to. A condition of receiving compensation under that contract was the performance of or the offer to perform the services intended by it. After a time the son became a confirmed invalid, and by the first part of 1874 was unable to perform the services. Although the father, after that time, continued to give those credits, the amount of a part of which was recovered in the present judgment, the testator was not entitled to such credits, but they were voluntarily, and without consideration, made in the accounts. If the accounts delivered create a presumption of obligation, the testimony shows that that arose only out of the contract of employment, and the testimony affirmatively shows that the testator had not performed on his part, and that there-

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fore there was, in fact, no obligation on defendant's part. But I am of opinion that we can examine no other claim than that on which the plaintiff stood at the trial. And the examination of any other claim must be remitted to the court of first instance.

THE NEW JERSEY LIGHTERAGE Co., RESPONDENT,
v. THE NEW YORK MUTUAL INSURANCE Co.,
ET AL., APPELLANTS.

Marine insurance—evidence of contract—deviation.

In an action to recover on a policy of marine insurance where the answer admits the making of a contract of insurance according to the conditions, etc., contained in said contract, and alleges that among others was a stipulation that the lighter insured, in the performance of her voyage, should not "sail to, touch or stay at any ports, etc., unless thereto obliged by stress of weather, or other unavoidable accident," and further alleges a breach of said condition; the only proof of the contract of insurance being the following certificate issued to plaintiff: "This certifies that N. J. L. Co. are insured under and subject to the conditions of open policy No. A. issued by this office, in the sum of \$2,500 on railroad iron on board the lighter Hebe, at and from Norwalk, Conn., to Jersey City, N. J., loss, if any, payable to them or order hereon and return of certificate. \$2,500, at $\frac{1}{4}$ per cent. premium, \$6.25." It appeared upon the trial that said policy No. A. was in the personal possession of one of defendant's witnesses then present.

Held, that the certificate itself sufficiently sets forth a contract of insurance binding upon defendants, and that if they desired to take advantage of any conditions not contained in said certificate, it was their duty to put in evidence said policy No. A.

Also, held, that the question of "deviation" must be determined by the motives, ends and consequences of the act, and the fact that the deviation in this case was from necessity, would excuse the insured, even if the conditions in that regard were proven.

Before O'GORMAN and INGRAHAM, JJ.

Decided April 9, 1883.

The jury in this case having found a verdict for the plaintiff for \$126, the court ordered the exceptions of the defendants to be heard in the first instance at general term.

Opinion of the Court, by O'GORMAN, J.

The facts are stated in the opinion.

Benedict, Taft, & Benedict, for respondent.

John Berry, for appellants.

BY THE COURT.—O'GORMAN, J.—This is an action to recover from the defendants their *pro rata* share of a loss of railroad iron on board of the *Hebe*, which capsized in rounding the Battery, about four o'clock in the afternoon of August 15, 1878. The plaintiff claims that the aggregate loss amounted to \$1,024. The defendants answered separately. The defendants' counsel moved the court for a nonsuit on the ground that the proof was insufficient to entitle the plaintiff to a recovery. This motion was denied and the court directed a verdict for the plaintiff for \$126, and ordered the exceptions of the parties to be heard at the general term, the plaintiff to make the case.

It is alleged in the complaint, that the defendants, being respectively duly incorporated under the laws of New Jersey, were doing business in New York together, for their joint account under the name of the "National Lloyds," and that on August 15, 1878, they insured the plaintiff in the sum of \$2,500, on railroad iron on board the lighter *Hebe*, at and from Norwalk, Connecticut, to Jersey City, N. J. The defendants, in their answer, admit that they were so incorporated and did, each of them, enter into a contract of insurance with the plaintiff, by which they did insure it in the manner, and on the terms, conditions, and stipulations in said contract contained; and that by the terms of said contract of insurance, it was among other things agreed that the said lighter, in performance of said voyage, should not sail to, touch or stay at any ports or places unless thereto obliged by stress of weather or other unavoidable accident; and that the lighter did sail to, touch, and stay at another place, to wit: the city of Brooklyn.

The plaintiff produced in evidence, the following certificate of insurance: "Certificate of Insurance No. 2,134. \$2,500. National Lloyds, 73 William St., New York.

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“NEW YORK, August 15, 1878.

“This certifies, that New Jersey Lighterage Co. are insured under and subject to the conditions of open policy No. A, issued by this office, in the sum of twenty-five hundred dollars on railroad iron on board the lighter Hebe, at and from Norwalk, Conn., to Jersey City, N. J., loss, if any, payable to them or order hereon and return of this certificate. \$2,500. At $\frac{1}{4}\%$ premium, \$6.25.

“ARTHUR LEARY, Attorney.

“Not valid unless countersigned by John Newman.

“JNO. NEWMAN.”

The open policy No. A, was not produced on either side, although one of the witnesses, examined on behalf of the plaintiff, said that it was in his pocket. Evidence was given on the loss, and that the lighter had, during her voyage up the East River, made fast to a dock alongside Martins' stores in Brooklyn, and had so remained there about three-quarters of an hour, because in the then condition of the wind and tide, she could not go any further without a tugboat; that the captain sent word for a tugboat, and got one; and that while passing out from the East River into the Battery, he got into a kind of slack water, and going from one tide into the other, in a kind of whirlpool, the vessel capsized. The defendants' counsel during the course of the trial objected in effect that plaintiff's case was incomplete without production of policy No. A; that the certificate proved is not a contract of insurance, and does not contain the elements necessary to make a perfect and certain contract of insurance. This objection is not tenable. The defendants in their answer admitted that they had entered into a contract of insurance with plaintiff, by which they did insure the plaintiff's railroad iron on board the lighter Hebe, in the manner, and upon the terms, conditions and stipulations, in said contract contained. If any terms, conditions, or stipulations, not set forth in the certificate proved by the plaintiff, were of a nature to defeat the plaintiff's claim, it was the duty of the defendants to put in evidence the policy No. A, referred to in the certificate, and in which such

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conditions may have been contained. The certificate itself sufficiently sets forth a contract of insurance of the plaintiff in the sum of \$2,500, of railroad iron on board the lighter Hebe at and from Norwalk, Conn., to Jersey City, N. J. The defendants, having failed to show any other terms or conditions, must be bound by the certificate as it stands.

But the only one of the alleged terms or conditions set up in defendants' answer, the violation of which they relied on as a defense, was one prohibiting *deviation*, and they claim that making fast to a dock in Brooklyn, on the voyage, was a deviation, on account of which the insurance became discharged. This act of the master of the vessel was not deviation, of a nature to avoid the policy, but a proper precaution, and necessary to overcome the force of the wind, and of the ebb tide from the Hudson River, which might have swept the vessel down the Bay. It worked no injury to the defendants, and added nothing to their risk.

The question of deviation must be determined by the motives, end and consequence of the act. The fact that deviation was from necessity, excuses the insured. The defendants' exceptions should be overruled and judgment entered for the plaintiff, with costs.

INGRAHAM, J., concurred.

JAMES C. BOLTON, ET AL., APPELLANTS, v. WILLIAM SCHRIEVER, RESPONDENT.

Adverse possession—what sufficient to constitute.

It is not necessary, in order to establish title by adverse possession, to show that the inclosure relied on, was such an one as would prevent persons from climbing over or breaking in, but it must be a substantial inclosure, and one that will give notice to the world that the ownership of the property is claimed; and what is sufficient depends much upon the character of the property in each case.

The evidence in this case reviewed and considered by the court, and held sufficient to establish an "actual, open, continuous and hostile" posses-

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sion, in defendant's grantors, of the premises in question for twenty years under claim of title founded on a written instrument.

Before O'GORMAN and INGRAHAM, JJ.

Decided April 9, 1883.

Appeal from judgment in favor of the defendant entered on a verdict of a jury, and from order denying motion for new trial on the minutes.

The facts are stated in the opinion.

James C. Bolton and J. Alfred Davenport, for appellant.

Lewis Johnston and Albert Matthews, for respondents.

BY THE COURT.—INGRAHAM, J.—This is an action of ejectment for a lot of land on Tenth avenue, between Thirty-second and Thirty-third streets, in the city of New York, known as No. 398 Tenth avenue.

It appears to have been conceded on the trial, as it was in the argument of the appeal, that plaintiff showed a valid title to the property in question, except for an adverse possession; and the learned chief judge before whom the action was tried, substantially charged that the jury must find a verdict for the plaintiff, unless they should find that the defendant and her grantors had had adverse possession of the premises in question; and the question on the appeal is, whether there was sufficient evidence from which the jury could find such possession.

It appeared that in the year 1853, the City Fire Insurance Company made a loan to one John B. Wright, and as security for such loan took a mortgage on the property in question from said John B. Wright, who claimed to be in possession of the property at that time. That mortgage was foreclosed, and the insurance company, on March 13, 1857, purchased the property at that sale and received a deed therefore, dated on that day, and immediately went into possession under the deed; for six years it rented the property and received the rents and profits, and during that time was in exclusive adverse possession; in 1863 the building on the property became untenable, and the

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company was unable to rent it. It remained untenable, except that it was at one time used for the storage of some barrels, until 1874, when the company sent and had the building taken down, and had a fence put up in front ; and it remained in that condition until 1877, when the company sold it, and shortly after that time a building was erected that still remains on the property. From the time that the insurance company purchased the property until they sold it, they paid the taxes, assessments and Croton water rents, and the president of the company swore that it never intended to abandon the possession of the premises, and had no knowledge that any one claimed the title to it or was ever in actual possession of it except the company.

It further appeared that during this period some one, under what purported to be a judgment of the supreme court in an action to which the company was not a party, put a gate in the fence and put up a sign ; but that immediately after the gate was put in the company had the gate taken down and the fence rebarricaded ; that the president went to see the property very often, but that sometimes four or five months might have elapsed between his visits. There was also evidence that the house on the property was built in the year 1844, and was occupied from that time until the year 1863 ; that no one lived in the house in the years 1864 to 1868 inclusive ; that occasionally it would be occupied by squatters, and on the complaint of some one (it does not appear who), the police had turned the squatters out ; that after the roof fell in the outside door was left open, and one of the policemen had fastened it up.

This action was commenced in May, 1880. If there was sufficient evidence for the jury to find that the possession of the insurance company continued while the building was untenable and unrented, from 1864 to 1874, when the insurance company had the fence put up, there then was an adverse possession of the premises. It was established that the insurance company entered into the possession of the premises under a claim of title exclusive of any other right, founding the claim upon another instrument, as being a

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conveyance of the premises in question, so that the requirements of the adverse possession can be determined by section 370 of the Code of Civil Procedure (that section being substantially a re-enactment of section 83 of the Code of Procedure)—and that for a period of six years they were in exclusive adverse possession, renting the property and receiving the rents thereof and exercising all the acts of ownership over it.

It is undoubtedly true that the possession must be “actual, open, continuous, hostile and exclusive” for twenty years; that if there is any breach in the possession the adverse possession is not established; but the statute does not require an impossibility. The property is by the statute to be usually cultivated or improved, or “protected by a substantial inclosure”; either of these is sufficient to constitute the “possession.” It is nowhere required that the inclosure should be such a one as would prevent persons from climbing over or breaking in, but it must be a substantial improvement or use of the property, or a substantial inclosure, one that would give notice to the world that the ownership of the property is claimed, and what is sufficient to constitute such a possession depends very much upon the character of the property.

Here as long as the property remained in a condition to be rented and tenants could be obtained, the company rented it and received the proceeds. It then became impossible to obtain tenants and the building was uninhabited; but the building was still on the property, it was still inclosed by a fence on three sides and the building in front, and the fact that squatters and stragglers at times broke in, made no such entry or divested the insurance company of the possession of the premises.

The evidence is direct that there was no intention of abandoning the possession. The president of the company paid frequent visits, the company paid the taxes and Croton rents, and when from the condition of the building it appeared as if it would fall down, so that it would be an inclosure the company took it down and replaced it by a fence,

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and that fence was continued down to the time the building which is now on the property was erected ; during all the time the property in question was unrented, however, the company exercised all the acts of ownership over it that are usually exercised by the owners of a piece of property in the condition of the premises in question ; the officers of the company went frequently to see it, and there was no entry of the plaintiff or any one else adverse to the possession of the insurance company.

We have examined the authorities cited by appellant, and do not think that they apply to the questions in this case, from the facts, and are of opinion that there was sufficient for the jury to find that the possession had been continuous, and adverse and sufficient to support the verdict. There were no exceptions taken to the charge. And without an exception an objection to it cannot be considered on appeal. There was no error committed on the trial and the judgment should be affirmed.

O'GORMAN, J., concurred.

THEODORE V. BREMSSEN, RESPONDENT, v. ADOLPH
ENGLER, APPELLANT.

Public policy—contract to obtain pardon.

An agreement with an attorney-at-law to do what can legally be done to obtain from the governor a pardon or commutation of sentence of a person convicted of a crime, is not unlawful, and the attorney can recover for services rendered thereunder.

It will be assumed that an employment of an attorney to do *what he can* to obtain a pardon, etc., contemplates only such legal and proper acts as the law allows an attorney to agree to perform.

Before O'GORMAN and INGRAHAM, JJ.

Decided April 9, 1883.

Respondent's Points.

Appeal from a judgment in favor of the plaintiff entered on the verdict of a jury, and from an order denying a motion for new trial on the minutes.

The facts are stated in the opinion.

F. F. Marbury, and *F. F. Marbury, Jr.*, for appellant.—An action cannot be maintained to recover for service rendering in procuring a pardon or a commutation of sentence (*Norman v. Cole*, 3 *Esp.* 253; *Hatzfield v. Gulden*, 7 *Watts*, 152; cited with approval in *Gray v. Hook*, 4 *N. Y.* 456; *McGill's Admr. v. Burnett*, 7 *J. J. Marsh. [Ken.]* 640; *Wood v. McCann*, 6 *Dana [Ken.]* 366). In the case of *Bowman v. Coffroth* (59 *Penn. St.* 23), the justice, delivering the opinion of the court, says "a contract to procure a pardon from the governor would now be held illegal, whether improper means were used or not." See also *Lyon v. Mitchell* (36 *N. Y.* 240).

Theodore Bremsen and *George H. Yeamans*, for respondent. — Contracts for preparing and presenting petitions and other documents, collecting evidence, making a statement or exposition of facts, and preparing and making an oral or written argument, to be used before the legislature, or a committee thereof, are lawful (*Sedgwick v. Stanton*, 14 *N. Y.* 289; *Russell v. Burton*, 66 *Barb.* 539; *Trist v. Child*, 21 *Wall.* 441). Lobby services and personal influence are placed on a different and less favorable ground. (*Marshall v. Baltimore, &c.*, 16 *How. U. S.* 153). A contract for a contingent fee for prosecuting a claim against the United States, pending in one of the executive departments, is not a violation of law or public policy (*Stanton v. Embrey*, 3 *Otto*, 548). A promise to pay for service and expenses in procuring a pardon for a convict in the state prison is not illegal or void (*Chadwick v. Knox*, 31 *N. H.* 226). An agreement to procure a pardon from the governor for a convict in the penitentiary, by the proper use of all legitimate means, is neither immoral or against the public policy (*Tormby v. Pryor*, 15 *Ga.* 258). The right to recover for such

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BREMSER v. ENGLISH
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Bird v. Breedlove

BREMSEN v. *Id.*
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ices was also affirmed in Bird v. Breedlove (24 Ga. 62;
c. Meadow (25 *Id.* 251).
INGRAHAM, J.—This is an action to
plaintiff, who is an attorney
the governor of
for the

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services to which there could have been no objection. The plaintiff then testifies that after the trial and sentence of the defendant's brother, and after the affirmance of the conviction by the general term of the supreme court, and in the latter part of June, 1879, the defendant came to plaintiff and asked him if he (plaintiff) "did not think something could be done yet;" that plaintiff said he did not see any chance, that every means was exhausted, and that he, plaintiff, had other business to attend to. Defendant there requested plaintiff to reconsider and think over it, and let him (defendant) know, and he would call again. On the second call defendant said to plaintiff, "I have paid so much money to the other lawyers and have got nothing for it, I will pay you well if you get him out and if you don't succeed I will pay you for your trouble." Plaintiff consented to go on, and under that employment plaintiff performed the services. The question to be determined is, whether this agreement was illegal and void as being a contract to procure a pardon or commutation of a sentence.

At the time the agreement was made, legal resources had been exhausted, the conviction had been affirmed, and nothing was left except an appeal to the executive clemency. This employment or agreement had therefore reference to procuring a pardon only.

It must be assumed that the parties had in mind when this consultation took place only such legal and proper acts as the law allows an attorney to agree to perform. The employment is capable of that construction, and we cannot assume that the defendant intended to employ the plaintiff, or that plaintiff intended to agree to do any act in respect to obtaining the pardon, which was illegal unless it was expressly so stated.

The question, therefore, is, can an attorney recover for services rendered under an employment to do what could legally be done to obtain a pardon or commutation of sentence of a person convicted of crime?

I think that a distinction should be made between an employment of this kind and a contract to procure a par-

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don made by a person who is not an attorney ; such a contract would be objectionable, because it would appear on its face that the means to be employed were influence or personal solicitation, or some others equally objectional, while in this case the employment is to perform services in the line of the employee's profession, which for any other object would be unobjectionable.. The ground upon which this class of contracts is declared illegal is illustrated by the case of *Gray v. Hook* (4 *N. Y.* 457).

It there appeared that the plaintiff and defendant were candidates for an office which was to be filled by an appointment by the governor, as was supposed with about equal chances of obtaining the appointment. They made an agreement by which Hook was to withdraw and cast his influence for the appointment of Gray, and in consideration of which Gray agreed to pay Hook one-half of the emoluments of the office. The court held that the contract was void. The court says, "There is quite as much reason for applying the principle to contracts made for the purpose of influencing and perverting the most important and extensive operations of the legislature and executive power of the government. . . . No citizen can therefore legally stipulate to embarrass the operations of the government by diminishing its powers;" and approves the decision in the case of *Hatfield v. Gulden* (7 *Watts*, 152), which held void a contract to procure signatures to a petition to obtain a pardon from the governor for one convicted of a crime and sentenced to imprisonment.

But the employment in this case was very different. Defendant requested plaintiff, who was a lawyer, to do *what he could*, and promised to pay well if he was successful, and if not, to pay for the services rendered.

It certainly would not embarrass the operations of the governor to have a proper statement of the facts of the case prepared, affidavits prepared and verified, and the circumstances properly presented to him to show that the prisoner was a proper subject for the executive clemency,

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and I can see no reason why such a contract should be void as against public policy.

These services plaintiff performed under the employment of defendant and his promise to pay, and for them he is entitled to recover (*Sedgwick v. Stanton*, 14 *N. Y.* 289). The argument of Judge SELDEN applies to an application to the governor as well as to the legislature.

The charge of the judge who tried this case is not included in the case, and is not before the court, and the defendant did not, so far as appears, request the court to submit any questions to the jury. It must therefore be presumed that the jury were properly instructed as to the particular services for which the plaintiff was entitled to recover, and the jury having passed on that question and found in favor of the plaintiff, the verdict should not be disturbed.

I think that there was sufficient evidence from which the jury could find that the argument between plaintiff and Judge Fullerton and the defendant had been abandoned. That agreement was executed long before the employment on which the claim in suit was founded, and as it appears, prior to the argument and affirmance of the supreme court. It contemplated further legal proceedings, as well as an application for a pardon; and the subsequent employment by the defendant of other counsel to carry on the legal proceedings, and employment of another person to procure the pardon after the legal proceedings had failed, together with the new employment of plaintiff and the new promise to pay for services to be rendered thereunder, would justify the jury in finding that such agreement had been abandoned and the new employment was substituted for it. And as before stated, it must be presumed that such questions were properly submitted to the jury, and they had found that it was so abandoned.

We have examined the exceptions taken by defendant and do not think any of them well taken.

The objection to the question asked defendant in regard to other agreements was asked on re-direct examination

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after defendant had testified as to what had happened at the time of the alleged employment, and it was in the discretion of the judge whether or not to allow the witness to answer again ; and as the plaintiff relied on the agreement that had been put in evidence, it was immaterial whether other agreements had been made or not.

The other exceptions do not require special notice, and as no error was committed at the trial, the judgment should be affirmed with costs.

O'GORMAN, J., concurred.

GEORGE R. MORRISON, ET AL., RESPONDENTS, v.
WILLIAM R. LEWIS, AS RECEIVER, IMPLEADED,
&C., APPELLANT.

Pleading—false representations—replevin—allegations of ownership and of intent to deceive.

In an action to recover the possession of personal property alleged to have been obtained upon credit by means of false representations, where the complaint shows that plaintiffs sold and delivered the goods to defendant, and that in consequence of the fraud therein duly alleged, they seek to avoid the contract of sale, the complaint will be held on demurrer to sufficiently allege a special property in the goods and a right to their possession, under § 1720, Code Civ. Pro.

In such case, *it seems*, also, that the ownership of the property should be implied from the allegation of sale and delivery.

It is sufficient in such an action that the allegation that the false representations were made with intent to deceive and defraud plaintiff, can be fairly gathered from all the averments of the complaint.

Accordingly, where the false representations were alleged to have been made to a commercial agency with intent "to obtain credit and to induce merchants and others to sell goods to them," when defendants knew the statements were false and untrue, etc.,—*Held*, sufficient.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 9, 1883.

Appeal by defendant from judgment entered on order of special term overruling demurrer to the complaint, and ordering judgment for plaintiff.

Opinion of the Court, by INGRAHAM, J.

The action was to recover the possession of certain goods obtained from plaintiff upon false representations, made to a commercial agency.

John J. Adams, for appellant.

Dewitt C. Brown, for respondents.

BY THE COURT.—INGRAHAM, J.—The complaint alleges that the plaintiff, relying on certain representations made by defendants Hunt & Warren, sold and delivered to said Hunt & Warren as copartners, certain goods and merchandise particularly described, which were of the value of \$246.96; that said representations were false; that subsequently said Hunt & Warren made a general assignment for the benefit of creditors; that the assignee was removed by an order of the superior court and the defendant Lewis was appointed receiver of the property assigned by said assignment; that Lewis had qualified as such receiver and took possession of the property so assigned, and was in possession of the property described in the complaint. The complaint demands judgment for the possession of said goods and chattels and damages for their detention.

Defendant Lewis demurs on the ground that the complaint does not state facts sufficient to constitute a cause of action against him.

The special term ordered judgment for the plaintiff on the demurrer, and judgment was entered in favor of the plaintiff and against the defendant Lewis for the possession of the property therein described with costs. From that judgment defendant Lewis appeals.

The first defect in the complaint on which plaintiff relies to sustain the demurrer is, that there is no allegation in the complaint that the specific property sought to be recovered is or was the property of the plaintiff, or that plaintiff was the owner thereof, the only allegation being that plaintiff sold and delivered to defendants goods, etc., and the question to be determined is whether this is a sufficient allegation of plaintiff's ownership of the property.

The Code of Civil Procedure (§ 1720) provides how in

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an action for claim and delivery of personal property title shall be stated in the pleadings, and it is there stated that an "allegation to the effect that the party pleading or a third person, was at the time when the action was commenced or the chattel was replevied, as the case may be, the owner of the chattel, or that it was then his property, is a sufficient statement of title, unless the right of action . . . rests upon the right of possession by virtue of a special property, in which case, the pleading must set forth the facts upon which the special property depends, so as to show, etc., that the party pleading was entitled to the possession of the chattels."

I think the pleader has in this case complied with the provisions of this section. He alleges that plaintiff sold and delivered the goods to defendants, and in consequence of fraud asks to avoid the contract of sale and be placed in the same position that he was before the property was obtained from him by the fraud. The demurrer admits that plaintiff sold and delivered the goods; that the sale was induced by fraud; and that the goods are in possession of defendant Lewis. This is sufficient to show that the plaintiff has a special property in the property described, and is sufficient to enable him to maintain this action. The delivery of the property was part of a contract that was fraudulent. Plaintiff asks to have that contract rescinded and is entitled to have it rescinded. In order to completely rescind it, it is necessary to redeliver the property to the plaintiff.

The cases cited by appellant do not conflict with this view. In *Pattison v. Adams* (7 *Hill*, 126), the complaint alleged that plaintiffs were entitled to the possession of the property. It was "held that this was not sufficient, as in pleading his right the fact must be alleged and not the conclusion." In *Scofield v. Whitlegge* (49 *N. Y.* 259), the complaint alleged "that defendant had become possessed of and wrongfully detained from plaintiff." It was "held that the allegation that the property was wrongfully detained was a conclusion to be drawn from the fact of the ownership or right to possession, and that the fact must be alleged in the

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complaint, and not the conclusion. In this case it is the fact of the sale and delivery that is alleged, and that having been induced by fraud gives plaintiff a right to have it rescinded.

I think also that ownership of the property should be implied from the allegations of sale and delivery. Possession of personal property alone and without explanation is evidence of ownership (*Rawley v. Brown*, 71 *N. Y.* 85).

In an action to recover the value of property sold and delivered no allegation of ownership is necessary. The fact of the sale and delivery of the goods implies that the goods belong to the seller (*Phillips v. Bartlett*, 9 *Bosw.* 678). There is no reason why the same implication should not apply in this case.

The second ground on which it is claimed that the demurrer should be sustained is that complaint does not allege that the statement was made with intent to defraud. The complaint alleges that the representations were made for the purposing of securing credit to defendants Hunt & Warren, and to induce merchants to extend credit and sell goods to them, and that such representations were false, and were known to defendants to be false at the time they were made and when the goods were sold.

In the case of *Zabriskie v. Smith* (13 *N. Y.* 322) the court says, "it is sufficient, however, that the requisite allegations (*viz.*; that the false representations were made with an intention to deceive and defraud plaintiff) can be fairly gathered from all the averments in the complaint."

The averments in this complaint come within this rule and make out the allegation of bad faith and intent to defraud. The representations are alleged to have been made with intent to obtain credit and to induce merchants and others to sell goods to them, when they knew the statements were false and untrue. There could be but one motive, and that would be to defraud the persons trusting them on the faith of such representations.

The judgment appealed from should be affirmed, with costs.

SEDGWICK, Ch. J., and O'GORMAN, J., concurred.

Statement of the Case.

**MARGARETHA WEINHOLD, RESPONDENT, v. DAVID
D. ACKER, ET AL., APPELLANTS.**

Negligence—use of door under hatchway in store by customer.

Where it appeared that plaintiff and other customers of defendants had been in the habit, with defendants' permission, of using a certain door in their place of business for exit and entrance, which door was obviously intended for the transfer of freight, etc., and not for the use of customers,—in an action by plaintiff to recover damages for injuries caused by the falling of a hogshead through a hatchway above said door while plaintiff was entering the store, defendants are not entitled to have the jury charged that plaintiff, in entering by said door, took all risk of so doing. By giving such permission, defendants assumed a duty to plaintiff of protecting her from negligence.

The question whether permission was given by defendants so to use said door, is presented to the jury by evidence that prior to the happening of the accident, it had been used by plaintiff and others for exit and entrance.

Where, in such case, the evidence shows that immediately before entering said door, plaintiff was met by one of defendants' employees, who told her in a loud voice and with an excited manner and pushing her slightly, not to enter, defendants are not entitled to a charge that, "if the jury believe that plaintiff was directed by an employee of defendants not to enter said door, and through heedlessness or inattention she did not hear what was said to her, or hearing it disregarded the warning, the defendants are not liable." First, because the request implies that it was enough if said person were an employee, though plaintiff were ignorant of the fact; and second, because plaintiff, in either event, is not, under the circumstances, chargeable as matter of law with want of due care.

Before SEDGWICK, Ch. J., and O'GORMAN, J.

Decided April 9, 1883.

Appeal from a judgment rendered in favor of plaintiff for \$600 damages and costs, and from an order denying defendants' motion for a new trial on the minutes.

The facts appear in the opinions.

Stephen A. Walker, for appellant.

Henry Bischoff, Jr., for respondent.

Concurring opinion of SEDGWICK, Ch. J.

BY THE COURT.—O'GORMAN, J.—This is an action to recover damages from an injury to plaintiff by reason of alleged negligence of the defendants, on December 22, 1880. The plaintiff, a customer of the defendants, in the act of entering their store in Chambers street, by a side door in College place, was struck by a large hogshead which fell through an open hatchway from an upper floor. Much testimony was taken at the trial both as to negligence on the part of the defendants, and contributory negligence on the part of the plaintiff, and it was submitted fully and fairly to the jury by the trial judge.

The requests to charge made by the defendants' counsel were either unnecessary, the judge having in effect charged in his own language as requested, or were not sustained by the evidence. No error has been committed.

The judgment should be affirmed, with costs, and the order appealed from affirmed, with \$10 costs.

SEDGWICK, Ch. J.—[Concurring.]—I agree that the judgment should be affirmed.

The request of defendants' counsel which the court refused to charge, viz., that if the plaintiff entered the store through an entrance apparently not designed for the use of customers of the store, but obviously intended for the shipment and transfer of freight in the carrying on of defendants' business, the plaintiff assumed the risk of so doing and cannot recover, were not absolutely correct, under the circumstances of the case as the jury were at liberty to find them. For, if plaintiff and other customers of the store, had been in the habit of using the door referred to, for exit and entrance, with the permission of the owner, then the mere appearance of the door, being for the shipping of freight and not for customers, would not be tantamount to a direction of the owner to the plaintiff not to enter. The actual, although implied, permission to use, as a customer, would be a modification of such a supposed direction, and would entitle the plaintiff, if she entered, to protection against negligence. The testimony of the

Concurring opinion of SEDGWICK, Ch. J.

plaintiff that she and other customers of the store had before gone in at the door, presented a question for the jury, as to whether such use had not been with the permission of the owner.

The court also refused to charge as requested for defendant, "that if the jury believe that plaintiff was directed by an employee of the defendants not to enter the door, and through heedlessness or inattention, she did not hear what was said to her, or hearing it, disregarded the warning, the defendants are not liable." The testimony shows that the direction or warning referred to was given, if at all, as follows: Hamlin, a servant of defendants, was about to go in the door, when he was told of and then saw, the danger from the cask that was jammed in the hatchway. He stepped out and shut the door. He saw the plaintiff approaching the door. He said: "Look out, get back, don't go in there," and "I pushed her this way slightly and she jumped right away from me, acted wild and scared; and she went in spite of me, and the next moment I looked around and saw the cask on the floor and the lady on the floor. I used a pretty loud tone of voice. I was excited a little, thinking that I might have got hurt."

I do not think that as matter of law heedlessness, taking the meaning of that word as it could only be applied to the facts of the case, or inattention or disregard, would show negligence on the part of the plaintiff. Why, as matter of law, should ordinary prudence call upon her, to obey a direction or warning, as such, of a person, not known by her to be an employee, or who at least, in the course of due care on her part, would have appeared to be an employee? As matter of law, it is not a want of due care, to heed or attend to or disregard, the direction or warning of an excited man in the street, whose appearance and situation do not necessarily imply that he was an employee. The request implies that it was enough if Hamlin were an employee, without the plaintiff knowing or having reason to believe that he was. Again, if the plaintiff knew that Hamlin was an employee and did hear what he said, it was not

Statement of the Case.

absolutely her obligation to believe that it was dangerous for her to enter. The tones in which he spake, his own excitement, his pushing her slightly, affected her mind, as she heard and was giving attention to what he meant by his words. Taken altogether, it was a question for the jury of whether, if she had given ordinary care in hearing or heeding him, she would have known that he meant to tell her it was dangerous to enter the door. If circumstances that she did not control affected her mind, so that she did not understand what persons ordinarily would understand, the jury might consider the fact as to the main question of whether she used due care.

ELIZABETH J. HARNETT, APPELLANT, v. THE
BLEECKER ST. & FULTON FERRY R. R.
Co., RESPONDENT.

Contributory negligence—nonsuit on ground of.

Assuming the rule to be that the cases when a nonsuit will be sustained on the ground of contributory negligence are exceptional, and are confined to those where the undisputed facts show the omission or commission of some act, which the law adjudges negligence,—a case will be held within said exception, and a nonsuit proper, where it so appears that plaintiff was knocked down and injured by a street car while attempting to cross a street; that before starting she saw a car pass, but did not look to see if another were approaching; and that the street was clear of obstructions to her vision, so that had she looked, she would before starting have seen the car by which she was injured approaching.

Though it be taken as the rule that, on a motion for nonsuit, the most favorable view of the facts possible should be taken in behalf of plaintiff, yet in ascertaining what the facts are, if a fact is stated in a way most favorable to plaintiff by herself as a witness, and she afterward qualifies or contradicts the former testimony, she neutralizes in whole or in part that testimony, so that it cannot be considered as establishing the fact.
Per SEDGWICK, Ch. J.

INGRAHAM, J., agreed that the nonsuit in this case should be sustained, holding that absence of contributory negligence is part of plaintiff's case, and that there is here no evidence upon which a finding that plaintiff was not guilty of contributory negligence, could be upheld.

Opinion of the Court, by SEDGWICK, Ch. J.

O'GORMAN, J., reviewing exhaustively the facts and law, writes for reversal and new trial.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided May 7, 1883.

Appeal by plaintiff, from judgment of nonsuit at trial term.

The action was for damages, alleged to have occurred from the negligence of defendant's servants.

The facts and exceptions appear in the opinions.

Thomas P. Wickes, for appellant.

Robinson & Scribner and *Osborne E. Bright*, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—If the rule, stated in *Stackus v. New York C. & H. R. Co.* (76 N. Y. 464), be applied in this case, still the action of the court below, in nonsuiting the plaintiff, should be sustained. That rule was that to justify nonsuiting “the negligence must appear so clearly that no construction of the evidence or inference drawn from the facts, would have warranted a contrary conclusion, and that a verdict of the jury the other way, would have been set aside as against evidence.” The court further said: “The cases where a nonsuit has been sustained on the ground of contributory negligence are exceptional, and are confined to cases where the undisputed facts show the omission or commission of some act which the law adjudges negligent.

In *Barker v. Savage* (45 N. Y. 191), the plaintiff was a woman over sixty-four years of age, and lame, walking with a crutch. In crossing a street in the city of New York, she was knocked down and hurt by a cart, that was driving by. The court decided, that it would be negligence to cross a street without looking in both directions along the street to ascertain whether any vehicles are approaching, and if so, their rate of speed, and how far from the crossing. The court is of opinion that the plaintiff should have been non-

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suited, because there was no evidence that the plaintiff looked at all in either direction for approaching vehicles, and the evidence tended to show that she entered upon the crossing and walked along upon it, without taking any precaution for this purpose. It appeared that had she looked she could have seen the horse and cart in time to have avoided the danger, and that for some unexplained reason she failed to hear a cry that the driver made to notify her of her danger, although it was heard by persons at a greater distance than she, which would have been heard by her in time to avoid the danger if reasonably attentive to the situation of affairs.

In the present case, the plaintiff was standing on a street corner, about to cross the street. She saw a street railroad car pass. Without looking to see if another car was approaching, she began to cross. The car which knocked her down was in fact then approaching. The street was clear of obstructions to her seeing it. She first saw it, when it was within eight and a half feet of her. She then put up her hand, as if to warn the driver of the car. She testified "I put my hand up and was just crossing the track on which the car ran." This was given upon cross-examination, and the counsel asked the question, "When you first discovered the car you were in the middle of the track on which the car was running?" The answer was, "Yes, sir; I can make my solemn declaration that the car ran over me and the horses threw me." The question was then repeated, "And when you first discovered the car it was at the distance from you that you have described, and you were in the center of the track on which it was running?" The answer was, "I was outside of the track, not immediately standing on the track, a short distance outside, may be half a foot." She was then in safety, for the car was eight feet distant and she could have moved backward. She however, lifted up her hand and proceeded. Intermixed with the evidence that has been given, she made statements that tended to make her testimony inconsistent. If these statements are considered, the result would be that

Concurring opinion of INGRAHAM, J.

her testimony as a whole was not to be relied on for any purpose. For instance, she said that when she first saw the car, she was outside the track toward Chatham street. If this were the fact, she had only to proceed in the direction she was already pursuing, and she could not have been knocked down. If, indeed, she were in the middle of the track when the car was eight feet away, her testimony in answer to the question, "Did you move or stand still?" is "I should stand." I think this meant that it was absurd to suppose that she would stand still and not move and attempt to proceed. The question would still remain whether she was not in that dangerous situation by her previous negligence.

On the whole, it appeared, if her evidence is to be stricken from the case, that an exercise of due and ordinary care on her part would have disclosed that the car was approaching and that it was dangerous for her to cross before it. The presumption is that she did not intentionally incur the danger, but rather that she did not use the care that by law she was bound to use. If her evidence is to be used, the inference from it is the same as to the want of care, but it further discloses acts of positive rashness on her part. It was argued by the learned counsel for the appellant, who has filed an exhaustive and accurate brief, that on a motion for nonsuit, the most favorable view of the facts possible, should be taken in behalf of the plaintiff. That may be true, after the facts have appeared as such in the testimony. But in ascertaining what the facts are, if a fact is stated in a way most favorable to a plaintiff, by herself on the stand as a witness, and she afterward qualifies or contradicts the former testimony, she neutralizes in whole or in part, that testimony, so it cannot be considered as establishing the fact.

For the reason stated, I am of opinion that the judgment should be affirmed with costs.

INGRAHAM, J.—[Concurring.]—I agree with the CHIEF JUDGE that the judgment should be affirmed. I do not

Dissenting opinion of O'GORMAN, J.

think that there was any evidence upon which a finding of the jury that plaintiff was not guilty of contributory negligence could be upheld. The absence of contributory negligence is part of the plaintiff's case, and as plaintiff failed to establish that, she was properly nonsuited.

O'GORMAN, J.—[Dissenting].—The action was brought to recover damages for injuries claimed to have been inflicted on the plaintiff by reason of the negligence of the defendants. At the close of the plaintiff's case, a motion was made by the defendants' counsel for dismissal of the complaint, and the motion was granted on the ground of contributory negligence on the part of the plaintiff.

The question now to be discussed, is whether, on the evidence, the learned trial judge was bound to decide as a matter of law that the plaintiff had been guilty of negligence which contributed to the accident and was the proximate cause thereof, or whether he would have been justified in submitting the question as matter of fact to the jury for their determination. In considering this subject, an appellate court is bound to give to the testimony the interpretation and effect most favorable to the plaintiff, to concede to the plaintiff all presumptions and inferences most favorable to the plaintiff, to reconcile contradictions if they can be reconciled, or to select from the conflict of testimony such evidence as may be most favorable to the plaintiff, and to give the plaintiff the benefit of every reasonable doubt. The true test perhaps of the propriety of a nonsuit is this: If a jury, regarding the testimony in the light most favorable, had found a verdict for the plaintiff, would an appellate court have been bound to set aside that verdict as against evidence (*Stackus v. New York C. & H. R. R. Co.*, 79 *N. Y.* 464).

Treating the testimony in this case in the manner above prescribed, the following facts appear: On the morning of September 26, 1876, the plaintiff, a woman sixty-two years of age, was crossing Centre street at its intersection with Chambers street in this city. She had been at a savings

Dissenting opinion of O'GORMAN, J.

bank situated in Chambers street, between Broadway and Centre street, and on leaving the bank walked along the north side of Chambers street toward the east. When she arrived at the northwest corner of Chambers and Centre street, she stopped to allow a car going south, or down town, to pass by. A second car, also going south, was following the first car at a short interval. The plaintiff started to cross as soon as the first car had passed her, and she had arrived within about one foot from the sidewalk on the east side of Chambers street, when she was struck by the horse of one of defendant's cars going north, knocked down, and her leg was broken. Two by-standers were witnesses of the accident, and from their testimony it can be gathered that the day was a clear, bright day; that when plaintiff started to cross Centre street, the street appeared to be clear; that the defendants' car came down toward Chambers street going north at a rapid pace—very fast—the horses on a run; that there is a down grade on Centre street, opposite Chambers street; that cars usually go fast there; that this car went faster than cars usually go down that hill, and at the spot where plaintiff was struck; that the driver just before the accident, held the reins loose in his left hand and did not apply the brake until the horses had struck the plaintiff, and she had been knocked down and was lying on the ground. The track on which defendants' car ran, was the most easterly track,—the nearest to the east sidewalk of Centre street, and was only four or five inches from the curbstone. She was struck by the near horse on the west and left side of the car. He struck her just back of the collar, and knocked her down. She was then struck by the left wheel of the car, and pushed along about four feet. She was a little north of the north cross-walk when she was struck. She lay, when picked up, near the hind legs of the horse, with the dashboard of the car about up to her, and across the track, with her head towards the north-west. The driver was arrested immediately after the accident, and in answer to a question from the police officer, he said: "the horses knocked down

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an old woman—she must be drunk.” There was no evidence that she was drunk, or at all under the influence of liquor. The car when first seen was, according to a diagram in evidence, about one hundred and twenty-five feet from the spot where plaintiff was knocked down.

The learned counsel for the defendants states in his printed argument on this appeal that, “a car going only six miles an hour, will travel eight and eight hundred-thousandth feet per second.” This is only the ordinary jog which street cars usually travel, and going very fast down hill at a steep down grade, it may be assumed the rate of speed was at least ten or twelve miles an hour, which would carry the car one hundred and twenty-five feet in less than seven seconds. If this computation be correct, it gives a fair idea of the speed at which the car was going, immediately before the plaintiff was struck.

The testimony of the plaintiff herself throws no light whatever on the question of the negligence of the defendants. She was manifestly an uneducated, unobservant woman, so terrified and dazed by the suddenness of the accident, as to be able to remember but little about it. All that she knows, is that “she was run down by the car and mashed.” As she herself testified, she was “vulgar, and did not know the use of words; she could not give a very good account of herself.”

Upon this evidence, if there had been no other question but that of the negligence of the defendants, the case should surely have been sent to the jury for their determination. But the learned trial judge held, that there was evidence of negligence on the part of the plaintiff which contributed to the accident, and which as matter of law disentitled her to relief. This is the next question to be considered.

The law on that subject, as it may be gathered from the decisions of the court of appeals of this state, seems to be, that the plaintiff in an action of this kind, cannot recover damages from the defendant, if by his own fault, or absence of such ordinary care as a prudent man would take of

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himself under the circumstances, his own negligence was the proximate cause of the accident (*Massoth v. Del. & H. Canal Co.*, 64 *N. Y.* 524).

To justify a nonsuit on the ground of concurring negligence, the negligence must appear so clearly, that no construction of the evidence or inference drawn from the facts, would have warranted a contrary conclusion, and that a verdict the other way, would have been set aside as against evidence (*Kain v. Smith*, 89 *N. Y.* 375). In what respect was the plaintiff here in fault? In what did her negligence, if any, consist?

A case decided by the court of appeals, which in some of its features bears a resemblance to the case at bar, is *Barker v. Savage* (45 *N. Y.* 191). There the plaintiff, a woman over sixty-four years of age, lame, and wearing a hood which impaired her power of hearing, was run over by the defendants' cart, then moving on a street of this city at the rate of four miles an hour. The driver, when about twelve feet from the plaintiff, shouted to her and pulled in his horse. Plaintiff paid no attention to the shout, continued to advance, and was struck and injured. The trial judge charged that a person crossing the street had the right of way. A driver was bound to take care for him. A person crossing a street, was not bound to look either up or down, but only straight before him; and the driver was bound to avoid a collision with him. The learned Judge GROVER, delivering the judgment of the majority of the court, held that the charge was erroneous. That although less care is required in crossing streets of cities at the usual crossings, than at railway crossings, because vehicles traveling thereon move at less speed than railroad trains, and are to a greater extent under the immediate control of those having charge of them; nevertheless, reasonable care requires in all cases the exercise of vigilance proportioned to the danger encountered. That there was no evidence that the plaintiff had looked at all in either direction for approaching vehicles. That had she looked, she could have seen the horse and cart in time to have avoided them.

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The difference between the facts in that case, and in the case at bar will easily be seen. Here, the plaintiff did look, and gave attention to the two cars coming down south. Whether before or when she started to cross the street, she could have seen the car coming north, by which she was struck, if she had looked, is not certain, and was a proper question for the jury (*Smedis v. Brooklyn & Rockaway B. R. R.*, 88 *N. Y.* 13).

The learned counsel for the defense, in the case at bar, in his printed argument, computes, that if plaintiff were walking at the rate of four miles an hour, a rather fast pace for a woman of her years, she would have crossed to the spot where she was knocked down—thirty feet—in six seconds. She probably walked at a slower pace, but taking it as defendants' counsel states, the defendants' car would have traveled from the place where it was first seen by the witness, to the place where plaintiff was struck—one hundred and twenty-five feet—also in about six seconds. Thus, when plaintiff started to cross the street, the car might not have yet arrived within her range of vision, and the street might have seemed to her quite clear toward the south. She might fairly have expected, that no car, traveling at its ordinary rate of speed, could reach the crossing before she had passed over to the sidewalk on the east side of the street. And the danger of the car approaching her at a very fast pace—at a run—at the rate of ten or twelve miles an hour, or about double the ordinary speed, was a peril which she had no reason to anticipate, or to provide for. In other words, she may have had good reason to expect that she had twelve seconds to cross, whereas the car coming down at high and unusual speed, struck her within seven seconds of the time she left the sidewalk. She testified that when she first saw the car, it was about eight and a half feet away from her. This eight and a half feet, defendants' counsel computes, would have been crossed in less than one second, if the car traveled at the rate of six miles an hour. Traveling at ten or twelve miles an hour, the horses must have struck her in the same instant

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in which she saw them. When the car struck her, and not until then, a shout was raised (*Mentz v. 2d Ave. R. R.*, 2 *Rob.* 356; *aff'd* in court of appeals, 3 *Abb. App. Dec.* 274).

What the plaintiff did or omitted to do in that one instant of time,—whether in the shock and terror of that instant a man, younger, more active, more self-possessed, of better judgment than she had, might have even then saved himself by some quick and vigorous action,—is not the question.

That a person in a perilous situation makes a mistake in judgment, where had he remained quiet, he would have escaped injury, does not bar his action (*Wasmer v. Delaware, Lack. & Western R. R.*, 80 *N. Y.* 212, 218; *Cuyler v. Decker*, 20 *Hun*, 173; *Coulter v. Am. &c. Co.*, 56 *N. Y.* 585; *Buell v. N. Y. C. R. R.*, 31 *Id.* 314).

That the measure and degree of care, the omission of which constitutes negligence, is to be graduated by the age and capacity of the individual, is expressly decided in *Thurber v. Harlem Bridge, M. & F. R. R.* (60 *N. Y.* 326), and the cases there cited. Even the question, how far the intoxication of a plaintiff and the negligence inferable from that condition, was a concurrent or contributory cause of the accident was held to be properly submitted to the jury (*Milliman v. N. Y. C. & H. R. R.*, 66 *N. Y.* 642).

The case of *Thurber v. R. R.* (*supra*) is, in many respects, in point. There, a boy nine years old, on his way to school, was run over by one of the defendants' cars while crossing the Boston road in Morrisania. The accident occurred in midday, and the boy was in plain view of the driver of defendants' car. The chief question was as to the negligence of the plaintiff. The court said: "It is not enough to authorize a nonsuit, that there is evidence which would have warranted a jury in finding that plaintiff was negligent, and that his negligence contributed to the injury. The question of negligence depends very much on circumstances and is addressed to the judgment of men of ordinary prudence and discretion, and ordinarily for the jury. When the inferences to be drawn from the proof, are not certain and incontrovertible, it cannot be decided as a question of

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law, by directing a verdict or a nonsuit, but must be submitted to the jury. The circumstances of the case, the positions and conditions of the parties should be considered. The actual result does not necessarily condemn the attempt as rash, or even negligent. Plaintiff was lawfully in the street and crossing it for a proper purpose, and he mistook very slightly as to having time to cross over before the car should reach the point of his crossing. It would have been error to decide as matter of law, that the attempt to cross the street was under the circumstances, "*per se*," negligence.

In the case at bar, it might well have been argued, and the jury might not unreasonably have inferred, that the plaintiff had the right to expect that cars coming toward her from the south would travel at their usual pace, and that no car being seen by her on that side before she started to cross, she would have had ample time to cross in safety before any car, coming at its ordinary pace, could reach her; and that she was in no degree in fault in making the attempt (*Jetter v. N. Y. & H. R. R.*, 2 *Keyes*, 154; *Buel v. R. R.*, 31 *N. Y.* 314).

It should be remembered that she was struck within a few feet of the sidewalk on the east side of Centre street. In a second more she would have completed the crossing, and been wholly out of danger. All these were questions which should have been submitted to the jury.

There is another aspect of this case which deserves notice. The negligence of the plaintiff, even if there had been any, was not the "*proximate*" cause of the accident.

The plaintiff, while crossing the street, was for a period of six seconds, and while the defendants' car traversed a space of 125 feet, in full view of the defendants' driver, if he had been vigilant and looked for any one crossing; and he had ample time to brake up the car and slacken his speed, and avoid striking the plaintiff. He did not brake up his car, or slacken his speed until he had struck the plaintiff. She was walking on the ordinary cross-walk. He drove at an unusually fast pace—his horse on the run—the reins loose in his hand—his eye, as far as it appears, not

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directed toward the plaintiff. There is no evidence that he shouted or in any manner endeavored to attract her attention.

Even if she had been negligent and in fault, it was his negligence or fault, not hers, which was the "*proximate*" cause of the accident. The jury might have found that she exercised ordinary care, and was not in fault. If the driver of the car did not exercise ordinary care, it was his fault that was the "*proximate*" and chief cause of the injury; and if the jury had so found, their verdict could not have been set aside as against evidence. The plaintiff had the right to expect that the driver would slacken his speed when he saw her, and his omission to do so was not one of the dangers which she was called on to provide against (*O'Mara v. H. R. Railroad*, 38 *N. Y.* 445).

Even if there had been negligence on the part of the plaintiff, but the defendant could, in the exercise of ordinary care, have avoided the injury in spite of the negligence of the plaintiff, the failure of defendant to exercise that ordinary care was the "*proximate*" cause of the accident (*Wasmer v. Del. Lack. & W. Railroad*, 80 *N. Y.* 213, 217; *Green v. Erie Railroad*, 11 *Hun*, 333).

The theory and intention of the law, is not to punish either the plaintiff or the defendant for negligence; but to discover which party it was, whose fault, or omission in the performance of duty, was the actual, proximate, and moving cause of the injury; and to compel him to compensate the injured party therefor.

In *Kenyon v. N. Y. C. & H. R. Railroad* (5 *Hun*, 479), this language is used in the opinion of the court: "Where an engine driver can, with ordinary care, stop a train so as not to run over a person, the negligence of that person will not prevent a recovery. Neglect on the part of a person in charge of an engine to use ordinary care to avoid injuring a person on the track, is in contemplation of law equivalent to intentional mischief. He has no more right to run over a person, lawfully or unlawfully on the track, than he has to shoot him."

Such a case furnishes a just and well-established

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exception to the general rule, that contributory negligence on the part of the plaintiff, will defeat a recovery.

In *Healey v. Dry Dock, E. B. & B. Railroad* (46 *Super. Ct.* 473), the relative responsibility of the defendant and of the plaintiff, under somewhat similar circumstances to those of the case at bar, is placed on the surer ground of the negligence of the defendant being the actual, proximate, and moving cause of the injury, and the negligence of the plaintiff being only the remote and accidental cause.

In my judgment, there was enough of evidence in the case at bar on the question of negligence of the defendants, as well as of negligence on the part of the plaintiff, and the relation of each to the cause of the accident, to go to the jury; and the dismissal of the complaint was error.

The judgment should be reversed with costs.

CONTINENTAL TELEGRAPH Co., APPELLANT, v.
ALFRED NELSON, RESPONDENT.

Corporations—action against former president for over-issue of stock under contract—rule of damages—presumption as to value of over-issued stock.

In an action by a corporation against its former president to recover damages for wrongfully making a contract on behalf of the company with a third party for the performance of certain labor, which was paid for at a stipulated price in the stock of the company at par, it being alleged that the work could have been executed at a cost to the plaintiff of one-half the contract price, of which defendant was aware, etc., and there being no proof that the capital actually owned by the company was of such value, that the stock was worth its face value. *Held*, that there was no conclusive presumption that the stock so claimed to be over-issued was worth its par value; and that the measure of damages, in case the action will lie, is the amount of money which plaintiff would have been able to obtain by issuing the said excess of stock, in case it had not been taken from it, through the contract.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided May 9, 1883.

Appeal by plaintiff from judgment entered upon verdict of jury in favor of defendant.

Opinion of the Court, by SEDGWICK, Ch. J.

The plaintiff, a domestic corporation, claimed that from November 28, 1877, to November 27, 1878, the defendant was its president ; that on or about September 12, 1878, he, as the representative of the plaintiff, made a contract with one Middleton to lay submarine cables across the rivers and other waters between New York and Philadelphia, etc., at the price of \$13,750, in stock of the plaintiff at par ; that the contract was completed and the stock delivered to Middleton ; that the contract could have been executed at an expense to the plaintiff of not exceeding one-half the contract price which defendant knew, etc ; that the defendant was interested with Middleton through a private agreement ; and that the contract was made with the fraudulent and deceitful purpose, on the part of the defendant, to cheat and defraud the plaintiff, for his own benefit. The plaintiff asked judgment for \$7,575 and costs. The defendant answered, among other things, that he lent Middleton \$1,000 to enable him to carry out his contract ; that Middleton agreed to return the amount, or in lieu thereof, to pay the defendant the proportion in stock which the \$1,000 would represent in case the contractor should be paid wholly in stock.

The judge charged the jury that the plaintiff was entitled to recover any excess in value, over \$1,000 of the \$2,400 of stock at par, which defendant was to receive, as his *pro rata* proportion from Middleton, to which plaintiff excepted and asked the court to charge that the measure of damage was one-half of the stock actually issued to Middleton. Refused and plaintiff excepted. The jury rendered a verdict for the defendant.

Further facts and exceptions appear in the opinion.

Harry Wilber, for appellant.

Man & Parsons, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—The plaintiff has selected as a remedy of the wrong alleged by it to have been done by the defendant, an action for damages. Nothing but pecuniary compensation is claimed. It is

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claimed, that the defendant, while former president of the company entered, in behalf of the company, into a contract with Mr. Middleton, by which the latter agreed to lay certain cables, for five hundred and fifty shares of the capital stock of the company, the par value of those shares being \$13,750. It is claimed that the defendant at the time knew that the laying of the cables was not worth in the shares of the company more than \$7,500; that he was interested with Middleton, and for that reason entered into the contract in violation of his duty to the company. On this assumption, whatever other remedy the plaintiff might have, it would be right, that the defendant should pay what damages the plaintiff has suffered. It is not intended to examine the question of whether the plaintiff, in fact, had any cause of action, but only to point out, that here the plaintiff was bound to prove what damage there was.

Evidently, the damage must have come from the company having issued to Middleton certificates of shares, in the nominal amount of \$6,250, more than it would have issued, if the contract had been for the fair value of the laying of the cable.

On this subject, the plaintiff did not assume the position that it was a question for the jury as to the value of the stock referred to, but only claimed that there should be a verdict for the nominal amount of the stock. The counsel first, in asking a direction for a verdict in plaintiff's favor, as matter of law, claimed "that as to the measure of damages, that is also a question of law, to be determined by the court, and that the court direct a verdict for such amount, as the court thinks has been proved in excess of payment." This could only refer to nominal value, for as to actual value or market value, there had been a wide divergence of opinions and facts in the testimony.

After the charge of the court, the counsel asked the court to charge that the measure of damages is one-half of the stock actually issued to Middleton. The court refused the request. The case and the argument upon the appeal

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show that the request referred to the nominal amount of one-half of the certificates of stock issued to Middleton. On the argument of this appeal, the proposition is "that the stock, so illegally issued, must be estimated at its nominal or par value."

The damage to plaintiff, on the assumption made, would be the amount of money they would be, probably, using that word in a sense favorable to plaintiff, able to obtain, by issuing the \$6,250, in nominal amount, if they had not been taken from the company, through the contract that has been referred to. It will perhaps be clearer to refer to the shares as two hundred and fifty shares of the capital stock. The learned counsel claims that there is a conclusive presumption, that the company could obtain par value. And so it must be held, if the requests made upon the trial are correct, because on the facts, it was very clearly shown that it was at least doubtful, that the company's stock was of such value.

It is argued that it was a duty of the directors, not to issue certificates of stock, unless real value equal to nominal value was obtained. Such is the law, but it does not follow as a consequence, that the shares of stock can be disposed of, at their nominal value. The performance of the duty might, as in this case, it probably would, result in the certificates not being issued at all.

A corporation, of course, owns no more or less, because of its issuing or not issuing, certificates of shares of stock. The certificate is only evidence that the corporation has parted with a share, or undivided part, of the property actually owned by the company, with certain limitations that it is not material now to specify. After this share has passed into possession of subscribers or subsequent parties, there is no conclusive presumption, as to its value. There can be no reason for such a conclusive presumption as to it, because it had not changed hands, but remained with the company. In *Arnold v. Suffolk Bank* (27 Barb. 424), the case was that the plaintiff had subscribed for, or pur-

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chased of, the bank, ten shares of the stock and paid in the amount of subscription. The bank refused to issue to him the certificates which would be the evidence of his right. It was held that the plaintiff was the owner of the shares. It was held further that the plaintiff could recover an equivalent, for his stock, neither more or less. "If the stock had been worth more than its par value, the owner is entitled to the benefit of it. If it had been and continued worth less than its face, during all his ownership, that value is all that the plaintiff can claim." In the nature of things the same property could not be worth more, if possessed by a bank, than if possessed by a subscriber or purchaser from the bank (*Kinchman v. Lidiard*, 61 *Barb.* 579; *Van Allen v. Illinois Central Railroad*, 2 *Keyes*, 673). There was no evidence that the capital actually owned by the plaintiff, was of such value, that two hundred and fifty portions of it that would be represented by a certificate issued for two hundred and fifty shares would be an amount equal to par value.

If the matter that has been discussed were not in the case, it would be necessary to examine at length exceptions that referred to the merits. If all these had been determined on the trial, in plaintiff's favor, they would not have been entitled to recover the damages they claimed. The judge sent the case to the jury in a way that enabled them to pass upon the actual value of the stock, as proven by the testimony. They found that \$2,400 nominal value of the stock, was not actually worth \$1,000. It is consistent with this that the stock had some actual value, but what it was cannot be determined from the verdict. There were some requests to charge that the plaintiffs were entitled to recover, for what would be the value of two hundred and fifty shares without deduction; but their value it was insisted should be estimated, as matter of law, at the nominal value of the stock. As they were not entitled to recover this, I am of opinion that no error injurious to them was committed at the trial.

Statement of the Case.

Judgment affirmed with costs, and order appealed from affirmed with \$10 costs.

O'GORMAN, J., concurred; INGRAHAM, J., concurred in result.

THOMAS LUCE, RESPONDENT, v. JULIUS D.
ALEXANDER, ET AL., APPELLANTS.

*Bond—liability of parties executing, when discharged—complaint in action on.
Pleading—insufficient denial in answer.*

Where a bond is given upon opening a default, which bond is executed by the defendants against whom judgment was entered and two sureties, and is conditioned for "the payment of any judgment which plaintiff may recover," etc., and two judgments are rendered, one against all of the defendants for a certain sum, and another against one of the defendants for a larger amount, payment of said judgment recovered against all of the defendants does not release the parties executing the bond from their liability thereon as to the remaining judgment.

In an action on such a bond, it is not necessary that the complaint should show that plaintiff has exhausted his remedy against the principal.

A denial in the following form is insufficient to raise an issue: "defendant denies each and every allegation in said complaint contained, not hereinbefore specifically admitted or denied."

Before TRUAX and O'GORMAN, JJ.

Decided May 9, 1883.

Appeal from a judgment against the defendants, entered March 21, 1882, for \$1,202.62, damages and costs, and from an order denying a motion for a new trial.

The answer, after certain specific denials, contained the following clause:

"Further answering, defendants deny each and every allegation in said complaint contained not hereinbefore specifically admitted or denied."

The bond upon which this action was brought was given upon the opening of a default taken in an action by the present plaintiff against certain of the present defendants,

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and the condition thereof was that the parties executing it, should "well and truly pay, or caused to be paid, unto the above-named Thomas Luce or his certain attorney, executors, administrators or assigns, any judgment he may recover in said action, without fraud or delay."

Further facts and the exceptions appear in the opinion.

Joseph E. Newburger, for appellant.

Charles N. Judson, for respondent.

BY THE COURT.—O'GORMAN, J.—It is averred by the plaintiff in his complaint and expressly admitted, or not sufficiently denied by the defendants, that on January 23, 1879, they duly executed jointly and severally a bond under seal whereby they obliged themselves to pay to the plaintiff any judgment that he might receive in an action then pending in the court, wherein said Thomas Luce was plaintiff, and John C. Morrison, Theobaud Frohwein, Julius D. Alexander, and Magnus D. Alexander were defendants; that all the conditions and terms of said bond on the part of the plaintiff were duly performed; and that the plaintiff did, on December 14, 1880, recover in said action, judgment against said John C. Morrison for the sum of \$1,118.95, being the amount of a verdict against him with interest, and costs, and against said John C. Morrison, Theobaud Frohwein, Magnus D. Alexander, and Julius D. Alexander, for the sum of \$388.84, being the amount of the verdict against them in said action, with interest and costs; that the sum of \$388.84, with interest was paid to plaintiff on January 26, 1881, leaving the amount \$1,118.95, due and unpaid.

The defendants, Magnus D. Alexander, and Julius D. Alexander, in their answer, admit these allegations of the complaint, but deny that there was a valuable consideration for the bond, and allege that the said judgment was discharged by satisfaction on, or about March 7, 1881; and also that the said judgment was improperly granted and without warrant of law.

The plaintiff's counsel, at the trial of this action, put in

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evidence the bond of the defendants, and after proving interest, rested his case. The defendants' counsel thereupon moved for dismissal of the complaint, which motion was denied, and he duly excepted. He then put in evidence a document executed by the plaintiff's attorney, in which, (after setting forth the rendition of a judgment in said action on December 21, 1880, in favor of plaintiff against the defendant Morrison for \$1,018.95, and against the other defendants therein for \$388.84), he acknowledged payment of the sum of \$388.84, being the part so recovered against said Morrison, Frohwein, Magnus D. Alexander, and Julius D. Alexander. Defendants' counsel also put in evidence the record showing satisfaction of said judgment, in the sum of \$388.84, on March 7, 1881, and then rested his case.

The action was tried, by consent, by the learned CHIEF JUDGE of this court without a jury, and he adjudged that the plaintiff was entitled to payment in the sum of \$1,018.95, with costs and allowances.

The objections of the defendants' counsel, as presented in his requests to charge, and exceptions, and relied on in his printed points, are as follows: 1. That the bond sued on is without consideration, and void.

This objection is not tenable. The plaintiff, in his complaint has alleged that the bond was executed by defendant for a valuable consideration. Sufficient consideration for the execution of a sealed instrument will be presumed, in the absence of evidence to the contrary. No such evidence appears in this case.

2. That payment of part of the judgment discharges the sureties on the bond.

The case cited by the counsel for the defendants (*Woods v. Pangburn*, 75 *N. Y.* 495), is not in point, and does not sustain defendants' objection. Sections 1204-5 of the Code of Civil Procedure allow judgment to be given for or against one or more plaintiffs, and for or against one or more defendants, etc., and the court may render judgment against one or more defendants, and direct that the action

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proceed against the others. There is no authority for the position that payment by one defendant of the amount for which he is adjudged to be alone liable, is a discharge of the judgment against other defendants, adjudged to be liable in another sum.

3. Defendants further claim that no action can be sustained against the sureties, unless it appears by the complaint, that plaintiff has exhausted his remedies as against the principal.

This is matter of defense, and should have been set up by the defendants in their answer.

The opinion of Judge FOLGER in *Colgrove v. Tallman* (67 N. Y. 99), does not sustain the contention of defendants' counsel. In that case, it appeared in evidence, that the defendant, Tallman, had sold out his interest in a partnership to one Barnes, who agreed to pay the firm's debts. Tallman soon afterward notified the plaintiff, who then held an overdue note made by the firm, of his agreement, and requested him to collect it, which plaintiff failed to do. The court held that Tallman was by virtue of his agreement, in the position of surety for Barnes, and that the delay of the plaintiff to sue Barnes, on receiving notice from defendant, and defendant's request that he should collect the note from Barnes, released the defendant. There is no *dictum* in the opinion of Judge FOLGER, and no suggestion in the argument of the counsel in that case, that the plaintiff was bound in his complaint to negative the charge of negligence, which was the defendants' ground of defense.

It should be noticed that the allegations in the plaintiff's complaint, that all the conditions, etc., on his part had been duly complied with, etc., is not denied by the defendants in their answer. The form of denial is incorrect and insufficient (*Code Civ. Pro.* § 500, *Miller v. McCloskey*, 1 *Civ. Pro. Rep.* 252, and notes).

The defendants' objection that the judgment was invalid and improperly obtained, is not tenable. The validity of a judgment cannot be thus impeached collaterally.

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The remaining objections presented by the learned counsel for the defendants, are overruled.

The judgment is affirmed, with costs, and the order appealed from is affirmed, with \$10 costs.

TRUAX, J., concurred.

GEORGE GODFREY, AS ADMINISTRATOR, &C.,
RESPONDENT, v. OGDEN D. PELL, APPELLANT.

Order of arrest—jurisdiction—undertaking.—Irregularity, how waived.

Semble, that the failure of the judge granting an order of arrest to require from the plaintiff an undertaking in an amount at least equal to one-tenth of the bail required by the order, in compliance with § 599, Code Civ. Pro., is an error, rendering the order void for want of jurisdiction.

But such error is waived and cured where after arrest thereunder, defendant obtains an order to show cause in which he claims relief in the alternative, either that the order should be vacated and set aside on the merits and for irregularity (which is not specified, as required by rule 37), or that the amount of bail required in said order be reduced, upon which application the bail is reduced to an amount bringing the plaintiff's undertaking within the requirements of § 599, Code Civ. Pro.

Before SEDGWICK, Ch. J., INGRAHAM and O'GORMAN, JJ.

Decided May 9, 1883.

Appeal from an order denying defendants motion to vacate an order of arrest.

James M. Fiske, for appellant.

Felix T. Murphy, and *E. D. McCarthy*, for respondent.

BY THE COURT.—O'GORMAN, J.—So far as the merits of this case are concerned, and on the facts as they appear in the affidavits and papers used on the motion, this court holds that there was enough to justify the order of arrest.

A question, however, has been raised on the argument whether the learned judge who granted the order of arrest, did not err in failing to require from the plaintiff an undertaking in an amount at least equal to one-tenth of the

Opinion of the Court, by O'GORMAN, J.

amount of bail required by the order, in compliance with section 599 of the code, and whether such error rendered the order of arrest void for want of jurisdiction.

The amount of bail required, was \$6,000, whereas the amount of plaintiff's undertaking was \$250.

The defendant's order to show cause on which the order appealed from was granted, claimed relief in the alternative, either that the order of arrest should be vacated and set aside for irregularity and on the merits, *or that the amount of bail required in said order be reduced*. The learned judge by his order did reduce the amount of bail from \$6,000, to \$2,500.

We fully concur in the opinion of Judge LAWRENCE, in the case of *The Southern Navigation Co. v. Sherwin* (1 *Civ. Pro. Rep.* 46), cited by counsel for the defendant here, "that the liberty of the citizen is of quite as much importance as the preservation or security of his property, and that the provisions of the Code should be as strictly construed in cases of arrest as in cases of attachment."

The defendant in the case at bar, however, has in his order to show cause, complained of the defect, not as going to the jurisdiction of the court to grant the order of arrest, but only as an *irregularity*; and he has failed to specify in his order to show cause the irregularity complained of as required by Rule of Court 37.

The order appealed from is in compliance with one of the prayers of his order to show cause, to wit, that the amount of bail be reduced; and from that part of the order, no appeal has been taken.

The defendant's objection as to the insufficient amount of the plaintiff's undertaking, has in our judgment been waived by the defendant, and cured by the court.

The amount of defendant's bail having at the instance of defendant been reduced, the amount of the plaintiff's undertaking is sufficient.

The order appealed from is affirmed, with \$10 costs.

SEDGWICK, Ch., J., and INGRAHAM, J., concurred.

Opinion of the Court, by INGRAHAM, J.

MARY C. WHEELER, APPELLANT, v. THOMAS F.
TRACY, RESPONDENT.

Easements—when vendee may refuse title on account of.

Where the vendor in an executory contract for the sale of lands, agrees to convey certain real estate, viz.: "a tanyard property, . . . subject to a mortgage of \$3,500," the vendee is justified in refusing to take said premises, subject also to easements, *e. g.*, a right to certain water-power, also to keep up a dam, and to the use of a spring.

Before O'GORMAN and INGRAHAM, JJ.

Decided May 7, 1883.

Appeal from a judgment dismissing plaintiff's complaint.

The facts appear in the opinion.

Samuel R. Taylor and Charles C. Bull, for appellant.

Jackson & Martine, for respondents.

BY THE COURT.—INGRAHAM, J.—This action was brought to recover for the damages sustained by plaintiff for a breach of a contract to exchange a tanyard in Oakland, Sullivan county, New York, for certain property in the city of New York.

The contract or agreement is dated September 10, 1879, and by it defendant agrees to take the tanyard property in Oakland, Sullivan county, New York, subject to a mortgage of \$3,500, in exchange for house No. 532 West 45th street, in the city of New York, subject to \$9,500, and plaintiff agreed to exchange said tanyard property for said house in New York city, the agreement to be executed on or before Saturday, September 13, at room 53, 229 Broadway, New York. On the trial evidence was given tending to prove that prior to September 13, 1879, plaintiff executed a deed of the tanyard property, and that said deed so executed was on September 13, 1879, at room 53, 229 Broadway, New York; but that defendant did not appear on that day, and it was for such breach that plaintiff claims to recover damages.

It appeared that the deed so ready for delivery, excepted

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and reserved from the premises conveyed, the William N. Cuse water-power, at or near the butternuts, and excepted and reserved the right to draw water down the raceway, and also the right to keep up the dam across the raceway for said water-power, or any other use the party of the first part, his executors, administrators or assignees, may elect to use said water power for; also the right to enter at any time upon said premises to erect, rebuild or repair the said dam and to keep the same in repair; and also excepting and reserving the spring of water and the right to draw water therefrom, over or through said premises to the house where it is now drawn for use, and the right of ingress and egress to and from the same, with the right to retain and repair and keep in repair the pipe through which water is conveyed over or through the premises attempted to be conveyed.

It further appeared that these easements or rights, except the right to the spring of water, belonged at the time in question to one William N. Cuse, who had a mill for which the water in question was used, and the right to the spring was owned by Osner B. Wheeler.

By the agreement the plaintiff agreed to take the tanyard property, subject to a mortgage of \$3,500, in exchange for his house, and defendant agreed to exchange said tanyard property for the said house.

The defendant agreed to take and the plaintiff to exchange the tanyard property, and the only question is, did plaintiff perform his contract by conveying the property, subject not only to the mortgage for \$3,500, but also to various easements which were excepted and reserved from the conveyance of the property, and it appeared plaintiff was not at the time of the execution of the agreement or at any time thereafter the owner of the easements.

It has been well settled since the case of *Burwell v. Jackson* (9 *N. Y.* 535), that in the case of an executory contract for the sale of land, the vendor impliedly warrants that he has a good title to the land sold, and a vendee has the right if the title be defective, to refuse to receive it, and is not bound to take the title to the premises, when there are

Opinion of the Court, by INGRAHAM, J.

incumbrances on it, unless he expressly agreed so to do (See *Bonsel v. Gray*, 38 *Super. Ct.* 450).

The defendant agreed to take the title to the property subject to a mortgage of \$3,500; if the mortgage was \$4,500, it could not be claimed that the defendant would have been bound to convey his house for the property subject to such a mortgage; yet it is claimed here that he was so bound, although it appears that rights over the property were reserved to and owned by others, that as far as appears might have rendered the property entirely useless for the purpose for which defendant intended to use it.

It is sufficient that the implied warranty that plaintiff had a good title to the property was broken. If that is broken and the title to any portion of it fails, the vendee has a right to refuse to receive it, and it can make no difference that the title fails as to a portion of the property or a right to use a portion of the property only. Defendant was entitled to the property, and an offer to convey the greater portion is not sufficient.

It can make no difference, so far as this action is concerned, that defendant's property was incumbered by covenants against nuisances. If defendant was seeking to compel plaintiff to perform, or was suing for damages for non-performance, that would be a good defense to such a claim; but defendant simply claims that as plaintiff failed to show that she was able to keep her contract and convey to him what she had agreed to convey (*viz.*, the tanyard property subject to a mortgage of \$3,500, and to no other incumbrances), that he had the right to refuse to receive it.

The cases holding that covenants for a party wall and for a highway are not incumbrances, do not apply.

In this case the conveyance excepts and reserves out of the property, the Cuse water-power, a right to keep up a dam, and a spring. It does not appear how extensive a use of the tanyard property such a right might involve, and for all that appears, it may involve the use of the whole property; but, in any event, the defendant was to have the tanyard property, subject to a mortgage of \$3,500, and not

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subject to the right of other persons to maintain dams, and the property with the water power excepted, in addition to the mortgage. Plaintiff is presumed to know what she owns, and, if she agrees to convey more than she owns, can not complain if the other party refuses to accept a part instead of the whole.

The contract being a mutual one, neither could recover against the other for a breach of its terms or put the other in default, without tender of performance, or at best, proof of a readiness and willingness to perform (*Nelson v. Plimpton Fire Proof E. Co.*, 55 *N. Y.* 480). The plaintiff having failed to show such readiness and willingness to perform on her part, she could not recover.

The complaint was properly dismissed, and the judgment should be affirmed with costs.

O'GORMAN, J., concurred.

GEORGE N. TITUS, RESPONDENT, v. BENJAMIN P.
FAIRCHILD, APPELLANT.

Bond—to officer, when not forbidden by 3 R. S. 448, § 49.—Description of person—Recitals as evidence—Orders of court, when evidence in action on receiver's bond.

A bond given in pursuance of an order or decree by a receiver to the clerk of the court, conditioned for the faithful performance of the receiver's duty, does not fall within the prohibition of the statute forbidding a sheriff or other officer to take any bond, obligation or security by color of his office, except such as are provided by law.

Where the penal sum in a receiver's bond is payable to "J. M. S., clerk of the superior court, etc.," without any words showing that the obligee's representatives are to succeed to his rights, and which shows on its face that it is given in pursuance of orders of the court, to secure the faithful performance of the receiver's duty, etc., said bond will not be construed to be an obligation to said J. M. S. individually, but will be held valid for the purpose for which it is given.

An action on such a bond is properly brought by the party interested, in his own name, after leave of court by order, under § 814, Code Civ. Pro.

Appellant's Points.

The recitals in such a bond are *prima facie* evidence of the facts therein set forth, in an action thereon.

Where such a bond is conditioned that the receiver shall faithfully execute his trust and make payments as directed by order of the court, it is sufficient to sustain an action for breach thereof, against the sureties, to prove orders granted upon notice to the receiver and after he had been heard, directing him to pay a certain sum to plaintiff, and adjudging him in contempt for failure to do so, and plaintiff need not prove that there are sufficient funds of the estate in the receiver's hands to meet his claim.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided May 7, 1883.

Appeal by defendant from a judgment in favor of plaintiff and against the defendant, for \$5,618.74, entered on the verdict of a jury, by the direction of the court.

The facts appear in the opinion.

Arnoux, Ritch & Woodford, for appellant.—The bond upon which this action is brought is contrary to the statute, and is therefore null and void, if an official bond (3 *Rev. Stat.* 448, § 49, 6th ed.). Any bond taken by any officer by color of his office in any other case or manner than such as are provided by law, is void (*People v. Meighan*, 1 *Hill*, 298; *Webb v. Albertson*, 4 *Barb.* 51; *Bank of Buffalo v. Boughton*, 21 *Wend.* 56; *Webber v. Blunt*, 19 *Id.* 187; *Sullivan v. Alexander*, 19 *Johns.* 223; *Love v. Palmer*, 7 *Id.* 159).

The bond in question is only a personal bond to James M. Sweeney, the words "clerk of the superior court" being merely an addition descriptive of the person (*Brockway v. Allen*, 17 *Wend.* 40; *Moss v. Livingston*, 4 *Coms.* 208; *Davis v. Garr*, 2 *Seld.* 124; *Taft v. Brewster*, 9 *Johns.* 334; *De Witt v. Walton*, 9 *N. Y.* 571; *Barker v. Mech. Fire Ins. Co.*, 3 *Wend.* 94; *Hills v. Bannister*, 8 *Cow.* 32; *Pumpelly v. Phelps*, 40 *N. Y.* 59; *Merritt v. Seaman*, 2 *Seld.* 168; *Sutherland v. Carr*, 85 *N. Y.* 105). The law always favors sureties, so far as the terms of the instrument will permit, and they cannot be held beyond the letter of the agreement (*Ward v. Stahl*, 81 *N. Y.* 406). We insist

Appellant's Points.

that the bond of a receiver can only be given to the people of the state of New York. Such are all the precedents, and there is no law permitting it to be given otherwise ; and as insisted under the first point, if given to any officer or person, it is void. The approval of the bond by the judge does not make it legal or valid (See also *Merritt v. Seaman*, 6 *N. Y.*, 168 ; *Austin v. Munro*, 47 *Id.*, 360 ; *Buffalo Catholic Inst. v. Bitter*, 87 *Id.* 250).

If the bond were valid, no action could be sustained on it by plaintiff. It being only a personal bond, the action must be in the name of James M. Sweeney, or his assignee. The Code, § 814, provides that where a bond is given "to the people, or to a public officer for the benefit of a party or other person," an action may be brought by the party so interested, in his own name, upon procuring an order of court, etc., and this is not such a bond as the Code contemplates.

To make out his case, it was necessary for the plaintiff to prove the commencement of the action in which the receiver was appointed, the appointment of the receiver and the order as to giving security, and that he had funds in his hands sufficient to pay plaintiff his claim. The orders recited in the bond should have been given in evidence. There was no evidence before the court that such orders had been made. The recitals in the bond do not prove them (*Germond v. People*, 1 *Hill*, 343 ; *Caldwell v. Colgate*, 7 *Barb.* 253 ; *Borst v. Corey*, 81 *N. Y.* 592). Nothing contained in a bond by way of recital will estop a party to it from showing it to be void, as having been taken by an officer *colore officii*, and without authority of law (*Germond v. People*, *supra*).

If the surety can be bound by the order of the court to pay, the order must show on its face that upon an adjudication by the court of which proper notice had been given and jurisdiction obtained, the receiver had the funds in hand. In all of this class of cases where it has been held that the surety was bound by orders or decrees that the principal should pay, it was shown that sufficient funds came into

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his hands to pay with (*Thayer v. Clark*, 4 *Abb. App. Cas.* 391; *Dayton v. Johnston*, 69 *N. Y.* 419; *People v. Hascall*, 22 *Id.* 188; *Casoni v. Jerome*, 58 *Id.* 315; *Thomson v. MacGregor*, 81 *Id.* 592). The case of *Thomson v. MacGregor* shows that the surety is only bound for what he covenants. In the case at bar he is only bound that the receiver shall pay out of assets in his hands. Unless it is shown that there were assets, there was no liability.

George J. Greenfield, for respondent.—The bond was properly made to James M. Sweeney, clerk of the superior court. Section 715 of the Code of Civil Procedure, requiring such security to be in the form of a bond to the people, was not then in force (*Banks v. Potter*, 21 *How.* 474; 2 *Barb. Ch. Pr.* 522, precedent No. 282; 2 *Wait's Pr.* 239, 240; *Edw. on Rec.* 91, note a, No. 4 of Receivers' Bond in *High on Rec.* 548). And the bond could be prosecuted upon the application, and for the benefit, of any party interested (3 *Daniels' Chan. Pr.* 543; 3 *Bulst.* 62; *Banks v. Potter*, *supra*). But even if there should be any question about the regularity of the bond in this respect, it would be regarded merely as a defect of form and not of substance, and it would not invalidate the bond (*Wiser v. Blachly*, 1 *Johns. Ch.* 607; *Schoharie v. Pindar*, 3 *Lans.* 8, 11; *Farley v. McConnell*, 7 *Lans.* 428–20; *Weaver v. Shryock*, 6 *Serj. & R.* 262, 264; *Prior v. Williams*, 2 *Keyes*, 533; *Sikes v. Territ*, 4 *Jones. Eq. [N. C.]* 360; 2 *Rev. Stat.* 576, § 33; *Gerould v. Wilson*, 81 *N. Y.* 573). And in any event the bond having been voluntarily given by defendant, would be binding upon him, even if irregular. It would be deemed a valid common-law obligation (*Baker v. Bartol*, 7 *Cal.* 551; *Ring v. Gibb*, 26 *Wend.* 508; *Burrall v. Acker*, 23 *Wend.* 605 [21 *Wend.* 605]; *Adee v. Adee*, 16 *Hun*, 46; *Chamberlain v. Beller*, 18 *N. Y.* 115).

The action was properly brought in name of plaintiff, the real party in interest, under § 814, Code Civ. Pro. This section is merely declaratory of the rule established by the decision of the court under the old Code (*Baggott v. Boulger*,

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2 *Duer*, 160-170; O'Conner v. Such, 9 *Bosw.* 318; 3 *Daniels' Ch. Pr.* 543). And it was also held that the objection, if good for anything, should be taken by demurrer, and if not so taken, was waived (*Baggott v. Boulger*, 2 *Duer*, 160; O'Conner v. Such, 9 *Bosw.* 318, 320).

The recitals in the bond were evidence as against the defendant, the surety, of the facts stated therein, to wit, of pendency of the action, of the appointment of the receiver, and of the orders of the court therein recited (*Franklin v. Pendleton*, 3 *Sand.* 573; *Potter v. Merchant's Bank*, 28 *N. Y.* 641; *Scott v. Duncombe*, 49 *Barb.* 73, 84; *Carpenter v. Buttler*, 8 *M. & W.* 209; *People v. Norton*, 9 *N. Y.* 176, 179, 183; *Ransom v. Keyes*, 9 *Cow.* 128). Recitals in the bond are either *prima facie* or conclusive evidence of the facts recited as against surety (*Allen v. Locket*, 3 *J. J. Marsh.* 164; *Kellar v. Heclar*, 4 *Id.* 655; *Trimble v. State*, 4 *Blackf.* 435; *Id.* 553; *Cutter v. Dickinson*, 8 *Pick.* 386; *Norton v. Sanders*, 7 *J. J. Marsh.* 12; *Ceil v. Early*, 10 *Gratt.* 198). The evidence of plaintiff also established the pendency of the action at the time of and before the making of the orders and execution of the bond in question. The orders of the court in *Clark v. Binniger*, directing Barr, the receiver, to pay to plaintiff the amount therein stated, and adjudging that said Titus was entitled thereto, and the order adjudging said receiver guilty of contempt for refusal to pay, were conclusive evidence against defendant, the surety upon the bond, as to the breach of the bond and the amount this plaintiff was entitled to recover against him thereon (*Baggott v. Boulger*, 2 *Duer*, 160, 170; *Westervelt v. Smith*, *Id.* 449; *People v. Norton*, 9 *N. Y.*, 176, 183; *Scofield v. Churchill*, 72 *Id.* 565; *Thomson v. MacGregor*, 81 *Id.* 592; 597, 599, and cases cited; 9 *Abb. N. C.* 138; *Gerould v. Wilson*, 81 *N. Y.* 573; *Thayer v. Clark*, 4 *Abb. App. Dec.* 391 [46 *Barb.* 343]; *Casoni v. Gerome*, 58 *N. Y.* 351).

BY THE COURT.—INGRAHAM, J.—This is an action brought to recover the sum of \$4,254.66, from the defendant as one of the sureties on a bond given under and in

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pursuance of several orders of this court made in an action wherein Abraham B. Clark was plaintiff, and Abraham Binninger was defendant, and conditioned that one of the obligors, Thomas J. Barr, who had been appointed receiver of all debts, property and effects of the copartnership existing between the said Clark and Binninger should "duly account for what he had received or had in charge as co-receiver, or for what he shall have in charge as sole receiver in said action, and shall pay and apply the same as he may from time to time be directed or ordered by said court, and shall faithfully discharge the duties of his trust as such receiver. The bond was joint and several, and was executed by the principal, Barr and by Henry Smith and the defendant, as sureties. Henry Smith died before the commencement of this action. The bond provides that the obligors are held, etc., unto James M. Sweeney, clerk of the superior court as aforesaid, for which payment, etc., The bond then recites an order of this court in an action therein pending, made March 27, 1869, whereby Thomas J. Barr, one of the obligors, was appointed an additional or co-receiver with one Daniel H. Hanrahan, receiver of the property of the copartnership existing between Clark and Binninger; and also an order made April 12, 1870, requiring Hanrahan as receiver and Barr as co-receiver to execute new bonds in the penalty of \$250,000, for the faithful discharge of their duties as receivers, and providing that in case one of them should fail to give such security, that the other of them who had given such security should be the sole receiver under the original order appointing such receiver, and further reciting that said Hanrahan having failed to give such new bonds, that by an order of the court made April 27, 1870, the said Hanrahan was removed as receiver; and which order directed that the said Barr, if he should comply with the said order of April 12, 1870, should be continued as receiver; and which bond recited another order dated April 30, 1870, reducing the penalty of the bond to be given to \$100,000.

On the trial, the plaintiff introduced in evidence the

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bond duly approved as to the form, manner of execution, and sufficiency of securities, by one of the judges of this court; then an order of the special term of this court, made on motion to said Barr and after hearing counsel on his behalf, dated April 16, 1877, which ordered and adjudged that plaintiff in this action on June 14, 1870, had a lien upon the property, estate and effects in the possession of the said Barr as receiver, to the extent of \$5,237.80; that said Titus is entitled to be paid said sum of \$5,237.80, out of said property, etc., by said Barr, receiver; and that said Thomas J. Barr, receiver as aforesaid, do pay out of said property, estate and effects referred to, and he was thereby directed to pay to said Titus said sum of \$5,237.80, with interest thereon from August 22, 1876, within ten days after the service of a copy of the order. Plaintiff then introduced an order in the said action dated August 7, 1877, reciting the foregoing order, the granting of an order to show cause why the said Barr should not be punished for contempt in refusing to obey the said order of April 16, 1877, and that the said Barr had been heard, and it ordered and adjudged that said Barr had been and was guilty of a contempt in having willfully disobeyed the said order of April 16, 1877, by refusing to pay plaintiff in this action the said sum of \$5,237.80, with interest from August 22, 1876, less the sum of \$1,250, paid on account thereof, which reduced the sum ordered to be paid on account thereof to \$4,254.06, and further, committed said Barr for contempt, until such amount should be paid; and also an order dated February 18, 1878, authorizing plaintiff to commence an action on the bond. Plaintiff then testified that there was due him the said sum of \$4,254.06, with interest from May 17, 1877.

The court directed a verdict for the plaintiff.

The first objection taken by defendant is that the bond is within the prohibition of the statute that provides that no sheriff or other officer shall take any bond, obligation or security, by color of his office, in any other case or manner except such as are provided by law, such other bond, etc.,

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taken otherwise shall be void (3 *Rev. Stat.* c. 448, § 49, 6 ed).

It is very evident that the bond in question does not come within the provisions of this statute. The bond was not one taken by a sheriff or other officer, but was given in pursuance of a judgment or order of a court of equity, as security for the faithful performance of the duty of an officer of the court. The power to require such a bond the court has always possessed and exercised, and a bond given in pursuance of its direction becomes one given in pursuance of law. It was held in *Gerould v. Wilson* (81 *N. Y.* 578), that the statute does not apply to a bond taken in such a case, and all of the cases cited by counsel for the appellant apply to officers who are specially directed by statute to take bonds for their own good and safety, and under certain conditions, and they hold that a bond taken by such an officer that does not follow closely the statutory requirements is void. It is evident that such authorities do not apply to a bond given in pursuance of an order or judgment of a court of competent jurisdiction, as a portion of the machinery by which it is enabled to carry into effect its judgment. No provision of law has been cited that restricts this power of the court, and the approval of the bond by one of the judges of the court, adopts it as a compliance with the order.

But a more serious question is presented by the objections taken by the appellant that the bond is an obligation to James M. Sweeney personally, it not being taken to him as clerk of the court, and the penal sum is to be paid to "said James M. Sweeney, clerk of the superior court," and as no assignment by him or his representatives was proved on the trial, plaintiff had no right of action in the bond.

The principal case relied on by the appellant on the argument was the case of *Sutherland v. Carr* (85 *N. Y.* 105). That was an action on a bond given to secure the faithful discharge of the duties of one Marshall, elected supervisor of the town of White Plains, to a Jackson Hyatt, town clerk of said town, "to be paid to said town clerk, or his

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successors in office," and the objection was taken in that case that the bond was one to Hyatt individually, and not officially as town clerk, and that the addition of the words "town clerk" to his name was a mere "*descriptio personæ*." The court, however, held that the rule that where a party to a written instrument is described as executor, administrator or assignee, without introducing any words to show that he intends to act in such capacity, that such phrase is a mere description of the person, "is not so rigid a rule as not to yield to the evident purpose of the instrument; and if there can be plainly gathered from the whole of it that a particular character or capacity is to be attached to the person named, he will be deemed to hold it in his relation to the transaction. If in a pleading the promise or other obligation or the duties are alleged as those of or to the body that the person named represents, the pleading is looked upon as one for or against that body, "so it must be with an instrument in writing."

This being the rule, its application to the bond in question is not difficult. It will be noticed that no words are used to show that the obligee's representatives are to succeed to his rights; the money is to be paid to the "said James M. Sweeney, clerk of the superior court, aforesaid." The bond then recites the object for which the bond was given. It shows on its face that there was no obligation to James M. Sweeney individually, but that it was given in pursuance of several orders of the court requiring the receiver, before appointed, to give security for the faithful discharge of his duties as such receiver, and the condition of the obligation is not that any act should be done to or by James M. Sweeney, but that the receiver should perform the duties to which he had been appointed by the court, of which the obligee was in the instrument named as clerk.

Taking the whole instrument together, it must be apparent that the evident purpose and object of the bond was to secure to the parties interested in the trust the faithful discharge of the duties of the receiver, and that it

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was the clerk of the court who was the obligee, and not James M. Sweeney, the individual in his own right.

When this action was commenced, viz., September, 1878, section 814 of the Code of Civil Procedure was in force, and an order granting plaintiff leave to bring the action was all that was necessary to give plaintiff the right to sue. The bond having been a valid bond, and having been made to the clerk of the court, the recitals in the bonds of the pendency of the action in which the receiver was appointed, and the regularity of the appointment, were at any rate *prima facie* evidence of the facts therein recited.

The only other question that requires attention is, whether the order of the court directing the receiver to pay and adjudging him guilty of contempt is sufficient to sustain the action, without proof that there was sufficient funds in the receiver's hands, the property of the copartnership, to pay the amount due plaintiff.

It will be noticed that the conditions of the obligation are not only that the receiver will faithfully discharge the duties of the trust, but "that he will pay and apply the same (viz., what he had theretofore received as co-receiver, or what he shall receive or have in charge as such sole receiver) as he may from time to time be directed by the court."

In *Scofield v. Churchill* (72 N. Y. 565), the bond was one given by an executor, and was conditioned that the executor should faithfully execute the trust reposed in him as executor, and also obey all orders of the surrogate, etc. And it was held that if the surrogate makes an order that the executor pay over money to a legatee, which the executor fails to do, a breach of the conditions has occurred within the letter of the bond, and the positive undertaking of the sureties had become fixed and operative by the surrogate's decree, and in the absence of fraud or collusion, the decree of the surrogate is conclusive upon the sureties.

The conditions here are that the receiver shall account for what he has received and for what he shall receive, and shall pay the same by order of the court. The orders on

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notice to the receiver adjudge that he shall pay to plaintiff a portion of what he has received, and subsequently adjudge that he has not obeyed the order and was in contempt. The orders were all made on notice to the receiver and after he had been heard. I think they were conclusive upon the principal and sureties alike, and that the principal having failed to obey the order to pay, the conditions were broken and the obligation was in full force and effect. There can be no doubt of the power of the court to make the order directing its officer to pay property in his possession, and when such an order, is made and the principal refuses to pay, he has not only disobeyed the order, but has failed to faithfully execute the trust, and then there has been a twofold breach of the condition of the bond (*Gerould v. Wilson*, 81 *N. Y.* 578).

The order of April 16, 1877, adjudged that plaintiff had a lien on the property of said firm in the hands of said Barr, receiver, and orders the said Barr, as such receiver, to pay the said sum. That being an adjudication that said Barr had property of the copartnership in his hand and ordering him to pay, it is conclusive against the receiver, and the sureties on the bond having made themselves privy to the proceedings against their principal, are, without fraud or collusion concluded when their principal is concluded (*Gerould v. Wilson*, *supra*).

I am of the opinion that the judgment appealed from was right and should be affirmed with costs.

SEDGWICK, Ch. J., and O'GORMAN, J., concurred.

AMBROSE E. BARNES, APPELLANT, v. PETER P. DECKER, ET AL., IMPEADED, &C., RESPONDENT.

Foreclosure of mortgage—right to redeem—parties.

The owner of real property, parcel B, subject to a mortgage which also covers other property, parcel A, in which last-named property he has no interest, is not a necessary party to an action to foreclose a prior mortgage

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on said parcel A ; and though the said parcel A be sold under the decree for such sum as leaves nothing to be applied on the second mortgage, covering also plaintiff's premises, he cannot, by virtue of his said ownership of parcel B, be allowed to come in and redeem.

Before SEDGWICK, Ch. J., O'GORMAN, and INGRAHAM, JJ.

Decided May 9, 1883.

Appeal by plaintiff from judgment ordered at special term, dismissing the complaint.

The facts are as follows : There were two parcels of land in the city of New York, which may be called respectively A and B. Upon A there was a first mortgage and also a second mortgage, which second mortgage was also upon B. B was conveyed to the plaintiff, and was made by the conveyance subject to the mortgage upon it, it being recited that such mortgage rested in part upon other land. The first mortgage upon A was foreclosed. The plaintiff in the foreclosure action made as a party defendant one Schwenke, who had been the owner of the second mortgage, but before the foreclosure action had assigned it to the attorney, who appeared for the plaintiff in the foreclosure action. Schwenke had no knowledge of the pendency of the action, but an attorney appeared for him, at the request of the attorney for plaintiff in that action. The usual judgment of sale and foreclosure was entered. At the sale, the property was sold at such a sum, that there was no surplus to be applied to the second mortgage. It was bought by the plaintiff in that action. There was a claim upon the trial, that the conduct of the parties connected with the foreclosure was fraudulent as to plaintiff in this action, but as the relief he claimed depended upon his right to redeem the first mortgage of A, the subject of the foreclosure, enough facts have been stated for the purpose of the decision. The claim to redeem was placed upon the fact that parcel B was subject to the mortgage, the payment of which it was claimed should be borne, in whole or in part, by parcel A. The plaintiff demanded judgment, that he be entitled to redeem, etc.

Respondents' Points.

Charles W. Dayton, for appellant.

R. Clarence Dorsett, for respondent Decker; *Harrison & Langdon*, for respondents Blake, Wheeler and Harrison; *Abner C. Thomas*, of counsel.

The proper function of a foreclosure action is to extinguish the right, reserved by courts of equity to the mortgagor and his legal representatives, and termed the equity of redemption. This right belongs solely to the mortgagor and those who have derived the same interest in a lien upon the mortgaged premises under him. The person asking to redeem must have not only a *jus ad rem*, but a *jus in re* (*Story's Eq. Jur.*, § 1023; *Grant v. Duane*, 9 *Johns.* 612; *Lomax v. Bird*, 1 *Verm.* 182; *Boardman v. Catlett*, 13 *Sm. & Marsh. [Miss.]* 149; *McDougald v. Capron*, 7 *Gray*, 278; *Porter v. Reed*, 19 *Maine*, 363). There is another right than the right to redeem which is similar to it, and the confusion between these two rights is all that gives any color to the plaintiff's argument. That is the right which every surety has to pay the debt and be subrogated. In some cases it is not a matter of great importance to determine whether the one right or the other is being exercised; but they rest on entirely different principles and are easily distinguishable from each other (*Ellsworth v. Lockwood*, 42 *N. Y.* 89, 97). The right to redeem is an interest in the title junior to the mortgage lien. A right to pay and be subrogated, grows out of the obligation of suretyship. Those holding any portion of the title are necessary parties to the action to foreclose, but no mere surety is a necessary party. Thus, a mortgagor who has conveyed the title is not a necessary party to the action (*Drury v. Clark*, 16 *How.* 424); though such a mortgagor, if his grantee has assumed, may pay the debt and demand an assignment of the security (*Johnson v. Zink*, 52 *Barb.*, 396). So, the personal representatives of a deceased mortgagor are not necessary parties to the foreclosure, though they may eventually be liable for deficiency (*Leonard v. Morris*, 9 *Paige*, 90).. And the

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creditors at large of a deceased mortgagor who have not obtained any judgment lien cannot become parties, even on their own application (*The People v. Erie Railway Co.*, 56 *How.* 122). It has also been held that, when a part of the mortgaged premises has been alienated by the mortgagor the grantee is not a necessary party to foreclose as to the balance remaining in the mortgagor (*Hosgood v. Nichols*, 1 *Paige*, 220).

It is provided by statute, with respect to a referee's deed in an action to foreclose, as follows: "Such a conveyance is as valid as if it was executed by the mortgagor and mortgagee, and is an entire bar against each of them and against each party to the action, who was summoned, and every person claiming from, through or under a party by title accruing after the filing of the notice of the pendency of the action (*Code*, § 1632). Such a deed is, therefore, equivalent to a deed executed by the plaintiff, and all the defendants (*Parker v. Rochester & Syracuse R. R. Co.*, 17 *N. Y.* 283), and if a conveyance by all of the parties to an action to foreclose a mortgage, would convey a complete title, then all necessary persons have been joined. In this case there can be no doubt that a grant from all of the persons joined as defendants in the foreclosure would have been ample to carry every interest, and that no deed from the plaintiff would have been required to perfect the title. The plaintiff had no interest in the title to be covered by a conveyance.

The precise question as to the necessity of making a person holding an interest in the land bound for a mortgage debt a party to a foreclosure against other land also bound for the same debt, was determined in *Kirkham v. Dupont*,

Cal. 559. In this case A. and B. owned land in common, which they mortgaged to secure a debt of A. Afterward A mortgaged his individual interest to D. The first mortgage was foreclosed without making the junior mortgagee of A.'s share a party. In an action to foreclose the junior mortgagee he offered to reclaim the whole of the property mortgaged. It was held that he could not do this, and that the sale was absolute, and that he could only redeem as to

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the interest on which he had a lien. (See also *Green v. Dixon*, 9 *Wis.* 532; *Hosford v. Nichols*, 1 *Paige*, 220).

BY THE COURT.—SEDGWICK, Ch. J.—[After stating the facts as above.]—At the time of the action for foreclosure, the plaintiff had no interest in the premises mortgaged. He was not an owner of any incumbrance upon the premises. Of course he had not any title to the second mortgage upon parcel A, and which was upon his land, parcel B. It may be supposed that upon his paying or tendering the amount of the second mortgage, he might acquire an interest in the mortgage, so far as it affected parcel A. This would have involved an affirmative act, from which he voluntarily refrained. He having no interest in the equity of redemption of parcel A, it was not required of the plaintiff in the foreclosure action to make the plaintiff here a defendant in that action, for the purpose of foreclosing such right of redemption as was connected with the second mortgage. On the other hand, this right of redemption was foreclosed, not simply because the former owner, Schwenke, who appeared upon the record to be the then present owner, was made a defendant, but because the real owner was the attorney for that plaintiff and would be by force of the record estopped from claiming that the owner of the mortgage was not foreclosed. There is, moreover, no proof that the plaintiff conspired with his attorney, who was the owner of the second mortgage, to make Schwenke a defendant, instead of the real owner, for the purpose of misleading the plaintiff, nor is there proof that he was misled thereby.

As the relief demanded upon the trial was based upon the claim to a right to redeem, there is no necessity of inquiring if the plaintiff had, at any time, any other kind of relief.

Judgment affirmed, with costs.

O'GORMAN and INGRAHAM, JJ., concur.

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GEORGE GODFREY, AS ADMINISTRATOR, &C.,
RESPONDENT, v. OGDEN P. PELL, APPELLANT.

*Pledge of shares of stock—conversion—right of pledgee to set up
title of third person.*

One who has received personal property as pledgee has no right to set up the claim of a third person as against his pledgor.

Accordingly, where plaintiff, upon the death of his son intestate, assigned to defendant as security for moneys loaned plaintiff, his interest as next of kin in certain shares of stock owned by said intestate, and the certificates of said stock were delivered to and received by defendant as such security, he being at the time president of the corporation which had issued them, and thereafter upon plaintiff's appointment as administrator of his said son, he tendered to defendant the amount of said loan to defendant and demanded the return of said certificates, which was refused by defendant upon the ground that the company had a claim against said intestate,—*Held*, that an action for conversion would lie.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided May 7, 1883.

Appeal from judgment entered November 23, 1882, in favor of plaintiff for \$5,902.31, damages and costs, and also from an order denying defendant's motion for a new trial on the judge's minutes, and to set aside the verdict.

James M. Fisk, for appellant.

Felix T. Murphy, for respondent.

BY THE COURT.—O'GORMAN, J.—This is an action to recover damages to the amount of \$6,250, with interest, by reason of the conversion by defendant of four hundred and ninety-nine shares of the capital stock of the "Business Address Company."

The case was tried before Judge TRUAX and a jury, and a verdict rendered for \$5,523.87. When the plaintiff rested his case, a motion was made for dismissal of the complaint. A motion was also made to set aside the verdict as excessive in amount, against the weight of evidence, as contrary to law, and for a new trial, which motion was also denied.

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Evidence was given sustaining the following statement of facts :

George Godfrey, Jr., died in the city of New York on February 13, 1882. He was at the time president of the "Business Address Company," a corporation doing business in the city of New York, and he possessed certificates of stock in that company representing four hundred and ninety-nine shares and one proxy. The whole number of shares was one thousand, the par value being \$10. On February 14, the day after his death, the plaintiff, who was the father of the deceased, and Lorenzo Godfrey, the brother of the deceased, applied to the defendant for a loan of \$500, and executed thereupon the following agreement :

"NEW YORK, February 14, 1882.

"In consideration of \$500, to be advanced to us from time to time as we may require, we hereby assign to Mr. Ogden P. Pell, Esq., all our right and title and interest that we hold as heirs of George Godfrey, Jr., deceased, amounting to four hundred and forty-nine shares of the stock of the Business Address Company ("Godfrey's lists"), to be held by the said Ogden Pell as collateral security only, the said loan to extend for the term of sixty days, at which time the said loan to be paid with interest. The drafts of George Godfrey and Lorenzo N. Godfrey, when paid, to be considered as receipts for money advanced. The said George Godfrey and Lorenzo N. Godfrey do not convey any right during the term named to vote on said stock at any business meeting of the said company, and we further jointly and severally obligate ourselves to pay the said five hundred dollars from the first moneys that may be realized out of the estate of George Godfrey, Jr., deceased, or otherwise. Done in duplicate, erasures, interlineations before signing. GEO. GODFREY, L. N. GODFREY.

"Witness, P. E. De Mille.

"Stock supposed to be in Business Address Company's safe when opened to be retained."

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This agreement was delivered to the defendant on the day of its date. At this time, administration had not been granted on the estate of the deceased. The certificates of this stock were at the time in an inner safe within a larger safe of the company in their office in Vesey street. The key of this inner safe had been in the possession of the deceased, but could not be found after his death. On February 20, 1882, this inner safe was broken open, and the papers of the deceased were taken out, in the presence of the plaintiff, the defendant, Mr. Murphy, attorney acting for the estate of the deceased, and Mr. Brennan, an officer of the company. Among the papers of the deceased were found nine certificates, representing four hundred and ninety-nine shares of stock issued to the deceased and one proxy. These certificates were put into a sealed envelope and indorsed by Mr. Murphy, as he testifies, thus: "Certificates of stock of the Business Address Co., to be retained by Mr. Pell until the payment of his loan." This envelope so indorsed was then, as Mr. Murphy testifies, handed to the defendant, who took the same, saying, "Whenever you have your money to pay this loan, I shall be only too happy to return it;" and at different times he gave to George Godfrey the sum required, \$470. On March 2, 1882, the plaintiff was appointed administrator of the estate of George Godfrey, Jr. On March 16, the plaintiff executed the following agreement:

"NEW YORK, March 16, 1882.

"In consideration of one dollar in hand paid, and a further consideration of \$3,000, to be paid on or before March 20, 1882, we, the undersigned, agree to assign and deliver to James F. Brennan, or his assigns, four hundred and ninety-nine (499) shares and one proxy of the stock of the Business Address Co., now held by O. P. Pell as collateral to loan, the said \$3,000 being in full payment of said stocks, with all our right, title and interest to and in same. The indebtedness of George Godfrey, J., deceased, to the Business Address Co., amounting to \$896.86, to be deducted from the above amount, and put in trust

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abiding settlement of same. The trust to be agreed upon by the parties interested.

(Signed) { FELIX T. M. (O. K.)
GEO. GODFREY, Administrator.
By L. R. HARBISON, Attorney."

To this document. was attached the following agreement of sale of the certificates by Brennan to one James A. Duffy :

"In consideration of the sum of \$1, and other good and valuable considerations to me in hand paid, I, James F. Brennan, do hereby sell, assign, transfer and set over to James A. Duffy and his assigns forever, all my right, title and interest, in and to the within instrument, and the certificates of stock therein referred to, and I do hereby fully authorize him or his authorized attorney to receive and duly receipt for the same. In witness whereof I have this 17th of March, 1882, set my hand and seal.

"JAMES F. BRENNAN.

"Witness: Geo. B. Ward."

Immediately after the death of Godfrey, Jr., the defendant had been elected president of the company. It is in evidence that on March 20, the plaintiff and Mr. Harbison, his attorney, and Mr. Brown, the attorney for Mr. Brennan, called at the office of the company, and the plaintiff tendered the defendant \$473 and demanded the stock. The defendant refused, alleging as a reason that the deceased owed the company \$1,100; and he would not deliver the stock until that indebtedness was paid. Harbison told the defendant that the plaintiff had contracted to sell the stock to Brennan for \$3,000, and Brown exhibited bills in his possession for that amount in readiness to complete the purchase; and demanded the certificates of stock and that a proper transfer should be made. About March 26, or 27, Harbison again had an interview with the defendant together with Murphy, who was the attorney for the estate of the deceased; and a tender of \$500 was again made to defendant, who again refused. Defendant then stated that he was acting under the advice of the lawyer of Mr. Duffy,

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and produced a letter which he had received from him dated March 21, requesting him to hold the stock. At the former interview of March 20, the certificates of stock were got from the safe, and produced by defendant. It is also in evidence that the defendant exhibited and called attention to a by-law of the company, prohibiting the transfer of stock when the owner owed money to the company. The defendant in his affidavit, admits that the indebtedness of the deceased to the company was \$896.86.

This is in substance the case for the plaintiff as it appeared in evidence.

The testimony of defendant, and testimony in his behalf, although in some respects different, does not materially contradict the testimony or affect the legal aspect of the case for the plaintiff.

The jury might reasonably have concluded the facts to be, that the plaintiff, being in immediate need of money on the sudden death of his son, borrowed \$470 from the defendant on the strength of the agreement in evidence, and on the security of the four hundred and ninety-nine shares of the stock of the company, to which deceased was entitled; that the nine certificates, representing such shares of stock, were found with the other property of the deceased; that such certificates were delivered to the defendant, and as a pledge for the payment of the amount lent by him; and were so received by him, not as president of the company, but as an individual, to be returned by him to the legal representatives of the deceased when the money was repaid; that the plaintiff, on receiving letters of administration on the estate of the deceased, ratified the agreement, and in pursuance thereof, on or about March 20, tendered the defendant the money loaned; and demanded the return of the stock, which plaintiff refused.

It will be perceived that all through this case, as well in the pleadings as in the evidence, no distinction is drawn between "shares of stock," and "certificates of stock," although the two phrases differ widely in technical meaning, the former being only the legal right to share in the

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profits and capital of the company, which is of course a thing intangible and incapable of physical delivery or conversion, while the latter phrase means the documents setting forth that right, and which may pass from hand to hand, and are capable of being locked up in a safe, or delivered, or withheld. It is however clear, that the parties to this action, in using the phrase, "shares of stock," and in all their dealings on the subject, had in view only the latter subject, that is to say, "nine certificates of stock."

It may be remarked, that the reason for defendant's refusal to return these certificates, as stated by him as a witness, and founded on the indebtedness of the deceased to the company, is not stated in the answer; and it constitutes no ground of defense in this action.

The defendant having received these shares as a pledge, was bound to retain them for the purposes of the agreement, and to restore them when the money lent by him on the strength of the pledge, was returned.

The demand was made on him by the plaintiff, for the purpose of carrying out the terms of an executory agreement for the sale of the stock by the plaintiff, which depended on the return to the plaintiff of the certificates, and the defendant has proved no justification for his refusal. The plaintiff alone, at that time, was entitled to possession of the certificates. The defendant, as pledgee, had no right to set up the claim of a third person as against the title of his pledgor (*Bates v. Stanton*, 1 *Duer*, 84; *Lund v. Seaman's Bank*, 37 *Barb.* 132).

The fact urged on the trial of the action as a justification of refusal, to wit, the indebtedness of the deceased to the company, gave the company no lien on these certificates of stock, although it might have warranted the defendant or proper officer of the company, in refusing to enter the transfer of the stock on the books of the company. It certainly constituted no reason for the defendant to retain them in his possession after payment or tender of the amount lent by him.

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The plaintiff, as administrator of his deceased son, might well have hesitated to acknowledge any indebtedness to the company, and have demanded return of the certificates, notwithstanding a claim of such indebtedness.

In the agreement for the sale of the stock made by him, however, he made provisions for deposit of \$896.86 pending investigation, which was the amount claimed by defendant to be due to the company. The defendant himself testified that he would not have delivered the stock any way.

The motion for a nonsuit was therefore properly denied.

The charge of the learned trial judge seems to have fairly submitted the facts to the jury, and no error was committed therein.

The question of the value of the certificates, was also left to the jury; and this court would not feel justified in setting at naught their verdict, on a question of fact so peculiarly within their proper sphere of inquiry, and sustained by evidence the weight of which it was their duty to determine.

The judgment should be affirmed, with costs, and the order appealed from affirmed, with \$10 costs.

SEDGWICK, Ch. J., and INGRAHAM, J., concurred.

MARCUS NEWBERG, RESPONDENT, v. JOSEPH
SCHWAB, ET AL., APPELLANTS.

Attorney—right to sue on undertaking assigned to him with judgment.

An attorney who has recovered a judgment for his claim upon which he has a lien for professional services, may take an assignment thereof, together with the undertaking given in the action, in payment of said services, and may bring an action on such an undertaking in his own name.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided May 7, 1888.

Opinion of the Court, by O'GORMAN, J.

Appeal from a judgment in favor of plaintiff, entered upon the verdict of a jury by direction of the court for the sum of \$603.02.

The facts are as follows : One Lewis Beckel sued George M. Mittnacht to recover the possession of a certain safe, keys, &c., or their value ; in that action the defendant was arrested for eloigning the property, and gave an undertaking upon arrest, his bail being the defendants in this action. Said action was tried and resulted in a judgment for the plaintiff Lewis Beckel ; execution was duly issued therein and returned unsatisfied. The said judgment was thereafter assigned to this plaintiff, together with the undertaking upon arrest above referred to, and this action upon the undertaking was then brought.

The plaintiff was the attorney for the plaintiff in the case of Beckel v. Mittnacht, and took the assignment to protect a lien on the judgment in that action, in which the undertaking in suit was given and in payment for services rendered by him therein.

Christopher Fine, for appellants.

Goff & Pollock, for respondent.

BY THE COURT.—O'GORMAN, J.—This case was tried before Judge FREEDMAN and a jury.

The chief question discussed was whether an attorney, having obtained a judgment in favor of his client, who was plaintiff in an action of replevin, upon which judgment he had a lien for his professional services, can, on the assignment of such judgment to him, succeed in an action in his own name against the sureties of the defendants in such action of replevin.

There is no legal objection to an attorney taking an assignment of a judgment in favor of his client in payment of any debt due to him by said client ; and becoming thus the lawful owner of the judgment (*Coughlin v. N. Y. C. & H. R. R. R.*, 71 *N. Y.* 443).

There is no reason why he should not be entitled to put in force all the lawful means which the assignor possessed to make the judgment effectual.

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The right to compel the sureties to respond for the default of their principals, the defendants in that replevin action, was one, and the most effectual of these means, and went with the assignment and the legal ownership of the judgment.

The judgment should be affirmed with costs.

SEDGWICK, Ch. J.—[Concurring.]—On the whole case. I am of opinion that judgment should be affirmed, with costs.

INGRAHAM, J., concurred.

JOHN G. BROOKS, ET AL., APPELLANTS, v. THE
MEXICAN CONSTRUCTION CO., RESPONDENT.

Foreign corporations—jurisdiction over—when objection as to waived.

The court has no jurisdiction over a foreign corporation in an action brought against it by a non-resident, except as provided for in section 1780 of the Code of Civil Procedure; and the objection to the jurisdiction may be taken at any time, although defendant has appeared generally, and put in an answer in which such objection is not taken.

Where certain of several joint plaintiffs, *e. g.*, joint owners of a vessel, for an injury, to which, beyond the jurisdiction of this state, the action is brought, are non-residents, and the remainder are residents, the objection to the jurisdiction still holds good.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided May 9, 1883.

Appeal by plaintiffs from order vacating attachment.

The plaintiffs were owners of the brig *James Miller*, and the defendant a foreign corporation. The action was to recover damages for injuries done to the brig by collision with a steam lighter belonging to the defendant, at a port on the Texas coast. The summons and complaint were personally served upon defendant's secretary in this city on July 8, 1882. On July 14, an attachment herein was granted and levied upon property of the defendant in this

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city. This attachment the defendant moved to set aside upon the ground that the court had not jurisdiction of the action. The motion was founded upon the summons and complaint, the affidavit upon which the attachment was obtained and an affidavit used by plaintiffs on July 11, upon an application to examine a witness before trial. By this latter affidavit it appeared that the plaintiffs, except two of them, were non-residents of this city. These two were residents. The motion was made before issue joined; but on the argument of the motion, plaintiffs' attorney read defendant's answer and his own affidavit, and sought to sustain the attachment by the proposition, that as the defendant had appeared and answered and omitted in its answer to set up as a defense, the fact that some of the plaintiffs were non-residents, the defendant must be held to have waived the defect. From an order granting the motion this appeal is taken.

Henry D. Hotchkiss, for appellants.—The cause of action was joint, as the several owners of a ship make but one owner (see *Abbott on Ship*. 5th Am. Ed. Story & P. Notes, 146; *Coster v. N. Y. & E. R. R.*, 3 *Abb. Pr.* 332); and the remedy was equally joint, and the residence within the city of some of the plaintiffs conferred upon this court jurisdiction of the whole controversy (*Hobert v. E. Tenn. Va. & Ga. R. R. Co.*, 4 *Law Bul.* 26; *People ex rel. Mills v. Superior Court, &c.*, 19 *Wend.*, 119; *Porter v. Lord*, 4 *Duer*, 682). The court below based its decision upon *Harriott v. N. J. R. R. Co.* (8 *Abb. Pr.* 284), but in that case it did not appear that any of the plaintiffs were residents of the city. Having failed to plead its objection, § 226, providing that the jurisdiction of a superior city court is always to be presumed, etc. gave the court jurisdiction of the cause of action, and by its appearance and answer defendant waived the privilege of § 1780, which is personal in nature. Under section 447 Code Procedure, which is similar to section 1780 (*supra*), it was held that a voluntary appearance and answer to the merits, was a waiver of

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an objection similar to that involved herein (*McCormick v. Penn. R. R.*, 49 *N. Y.* 303).

T. F. H. Meyer and *Mr. Zabriskie*, for respondent. —Cases in which action may be prosecuted within this state against foreign corporations, are specified in section 1780 of the Code, and to those cases the jurisdiction of the courts is limited (*Ervin v. Oregon R'y. & Nav. Co.*, 62 *How.* 490; see also *Harriott v. N. J. R. R. Co.*, 8 *Abb.* 284; and *McMahon v. Mutual Benefit Life Ins. Co.*, 8 *Abb.* 297). There are decisions which seem to hold that, under the wording of section 427 of the old Code, the question of jurisdiction as far as concerned actions in the supreme court was a *personal* one which might be waived, but that they have no application as the law stands at present will be apparent from a comparison of the language used in section 427 of the old Code, and that used in section 1780 of the present Code. In the latter the words "may be maintained only" are used instead of the words "may be brought," in the former. The change is significant. In the line of decisions referred to, the words "may be brought," as used in section 427, received an interpretation which will not fit the words "may be maintained only," used in section 1780. Section 1780 deprives the courts of the state of the power to hear and determine the *cause of action* alleged in this case, so far as the non-resident plaintiffs are concerned, and lack of jurisdiction of the cause of action cannot be cured or waived.

The following opinion was rendered by the court below:

"TRUAX, J.—All the plaintiffs are not residents, therefore they cannot maintain this action. The defendant by appearing and answering has not waived the objection that the court has not jurisdiction of the action (*Harriott v. N. J. R. R. Co.*, 8 *Abb. Pr.* 284). The attachment is vacated with \$10 costs."

Upon a re-argument the following additional opinion was rendered:

"TRUAX, J.—If the plaintiff's view of the meaning of

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sections 266 and 1780 of the Code of Civil Procedure is the right one, this court would have jurisdiction of an action brought by a non-resident against a foreign corporation when the supreme court has not jurisdiction. I do not think that such was the intention of the legislature. Section 1780 provides that in certain cases only shall any of the courts of this state have jurisdiction over a foreign corporation in actions brought by a non-resident plaintiff, and there mentions the cases.

“The case is not one of the cases mentioned in that section, but the plaintiffs contend section 266 provides that the jurisdiction of a superior city court may be presumed, and that a want of jurisdiction by reason of the non-existence of any of the jurisdictional facts specified in section 263 is a matter of defense, and is waived by the appearance of the defendant, unless it is pleaded in defense, and that the defendant not having pleaded that the plaintiffs are non-residents, cannot raise the question of jurisdiction on a motion to vacate an attachment; such, however, is not the meaning of those sections. They mean that the plaintiff need not set forth in his complaint that the contract sued on was made, executed or delivered within the state, or that the cause of action arose within the state, or that a warrant of attachment has been actually levied within this city, or that the summons has been actually served within this city, but that in a case in which the supreme court has jurisdiction, if the non-existence of these facts is not set up in the answer, the court will presume that they do exist.

“I am therefore of the opinion that this court has no jurisdiction over a foreign corporation in an action brought by a non-resident against such corporation, and that the objection to the jurisdiction of the court may be taken at any time, although it has not been taken in the answer.

“The motion to vacate the attachment is granted, with \$10 costs.”

The following decision was rendered at general term:

PER CURIAM.—Order affirmed, with \$10 costs, on opinion below.

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GEORGE T. NEWHALL, APPELLANT, v. WILLIAM H. APPLETON, ET AL., RESPONDENTS.

Contract—when extrinsic evidence admissible to explain phrase in.

Where the defendants, who were book-publishers, employed the plaintiff to canvass for certain serial publications, under a written contract, in which they agreed to pay him "four dollars an order" for the subscriptions taken by him; in an action by plaintiff for his commissions,

Held, that extrinsic evidence was admissible to show that said phrase had a well-settled meaning in the business, understood by both parties, viz.: four dollars for each *bond fide* subscription taken for the whole work, after the subscriber had accepted and paid for ten parts thereof.

Further held, that the books of account of defendants, the publishers, containing statements of subscriptions obtained by plaintiff, and other agents, of which latter there was no proof that defendant had knowledge, were admissible in proof of the meaning of said phrase.

Further held, that in determining whether or not said phrase was so clear and definite that extrinsic evidence is inadmissible, regard must be had to the consideration that it was used in a contract which had pecuniary gain for its object and to describe the means by which it was to be reached.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided May 16, 1883.

Appeal by plaintiff, from judgment entered upon report of referee.

The facts are stated in the opinion.

W. W. Badger, attorney, and *L. E. Chittenden*, of counsel, for appellant.—The referee clearly erred (1) in admitting evidence that the term "so much an order" had a settled meaning in the business, in connection with the payment of a canvasser for serials, and (2) in admitting evidence of what that meaning is. If the expression "in the business" refers to the house of the defendants in particular without reference to other houses in a similar business, it is indispensable that the defendant show knowledge on the part of the plaintiff of the particular usage by virtue of which defendants seek to give the term "so much an order" a pe-

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culiar meaning. This was not shown (*Flynn v. Murphy*, 21 *E. D. S.* 378; *Walls v. Bailey*, 49 *N. Y.* 468; *Hills v. Hibernian Ins. Co.*, 10 *Hun*, 29; *Sipperly v. Stewart*, 50 *Barb.* 68; *Wadley v. Davis*, 63 *Barb.* 500; *Lawson on Usages and Customs*, 5; quoting *Stevens v. Reeves*, 9 *Pick.* 198; and *Womersly v. Dally*, 26 *L. J. [Exch.]* 119). 1. Usage to be admissible must be not only certain, settled, general, legal and reasonable, but besides it must be uniform and must not be inconsistent with the terms of a contract (*Hinton v. Locke*, 5 *Hill*, 537; *Lawrence v. Maxwell*, 53 *N. Y.* 19; *Bank of Commerce v. Bissell*, 72 *N. Y.* 615; *Holmes v. Pettengill*, 60 *N. Y.* 646; aff'g S. C., 1 *Hun*, 316; *Walls v. Bailey*, 49 *N. Y.* 468, and cases cited; *Lawrence v. Gallagher*, 10 *J. & S.* 309; *Humphrey v. Dale*, 7 *E. & B.*, 256; S. C., aff'd, *E. B. & E.* 1004; 2 *Pars. Cont.* *546; *Lawson on Usages and Customs*, 369; *Collender v. Dinsmore*, 55 *N. Y.* 200; *Wescott v. Thompson*, 18 *N. Y.* 367; *Bassett v. Lederer*, 1 *Hun*, 274; *Blackett v. The Royal Exch. Ass. Co.* 2 *Cr. & J.* 244, *cur. per* L. Lyndhurst, *Yates v. Pym*, 6 *Taunt.* 446; *Simmons v. Law*, 3 *Keyes*, 219; *Mutual Safety Ins. Co. v. Hone*, 2 *N. Y.* 244; *Van Alstyne v. Ætna Ins. Co.*, 14 *Hun*, 360; *Groat v. Grile*, 51 *N. Y.* 431; *Bradley v. Wheeler*, 44 *N. Y.* 503; *Higgins v. Moore*, 34 *N. Y.* 422). To construe \$4 an order as meaning "\$4 for only such orders as are proved to be good by the delivery, acceptance of and payment for ten parts of a serial" is to contradict the plain terms of a contract (See cases cited, *supra*; *Walls v. Bailey*, 49 *N. Y.* 468; *Hinton v. Locke*, 5 *Hill*, 437; *Hill v. Hibernia Ins. Co.*, 10 *Hun*, 29; *Main v. Eagle*, 1 *E. D. S.* 619; *Holmes v. Pettengill*, 1 *Hun*, 316, S. C. aff'd, 60 *N. Y.* 646). If the expression "in the business" refers to the usage of the trade in general and not to the house of the defendants in particular, it is still indispensable that the plaintiff have knowledge of the usage (*Harris v. Tumbridge*, 83 *N. Y.* 100; *Walls v. Bailey*, 49 *N. Y.* 468; *Miller v. Burke*, 68 *N. Y.* 615; *Lawson on Usages and Customs*, 40).

The referee also erred in admitting the books of account of the defendants; because the sole object of their intro-

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duction was to show what the contract was between the plaintiff and the defendants, and this cannot be done for the reason that it is clearly incompetent to allow a party to prove his declaration while performing or endeavoring to perform his agreement, for the purpose of characterizing the agreement itself (*Moore v. Meacham*, 10 *N. Y.* 207; *Peck v. Von Keller*, 76 *N. Y.* 604; *aff'g S. C.*, 15 *Hun*, 470; *Reed v. U. S. Express Co.*, 48 *N. Y.* 468; *Whitehouse v. Bk. of Cooperstown*, 48 *N. Y.* 239).

Douglas Campbell, for respondents.

BY THE COURT.—SEDGWICK, Ch. J.—The referee found that the defendants, who are book-publishers, employed the plaintiff to canvass for certain serial publications, agreeing to pay him for his services the sum of \$4 an order for the subscriptions taken by him. He further found that “the expression \$4 an order” had a well-settled meaning in the business in which the defendants were engaged and was understood at the time by both defendant and plaintiff to mean that the canvasser should be paid \$4 for each *bona fide* subscription taken for the whole work after the subscriber had accepted and paid for ten parts or numbers thereof.

There was sufficient evidence to support the finding of the referee that the expression did have the meaning, as he found and that it was understood by both parties. The appellant contends that the contract, as found by the referee, was so clear in its meaning and so definite, that resort could not competently be had to extrinsic facts to determine the meaning of the words, \$4 an order, for the subscriptions taken by him.

In attempting to perceive, whether the phrase be clear and definite in meaning or ambiguous and indefinite, regard must be had to this consideration that the phrase was used to form a contract which had pecuniary gain for its object and to describe the means by which the gain was to be reached. The benefit would come to the defendants, not

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from the form or mere fact of subscription, but from its anticipated consequence of fulfillment. The opportunity of benefit, would exist in the subscribers being likely to fulfill his subscription. Clearly the contract did not mean to refer to subscriptions or orders that were so in form only, when from any cause, it was unlikely that the subscriber would take the book. After this is considered, there is uncertainty, as to the degree of likelihood of performance, that would be within the intention of the contract, and as to what characteristics of the subscription shall determine the kind of subscription intended. The words refer to several classes or kinds. In such case, section 288 of *Greenleaf's Evidence* states the law, as follows: "If the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several muniments or boundaries, to several writings, or the terms be vague and general, or have diverse meanings, in household furniture, stock, freight, factory prices and the like, parol evidence is admissible of any extrinsic circumstances tending to show what person or persons or what things were intended by the party, or to ascertain his meaning in any other respect."

There was, therefore, no error in the referee's reverting to facts given in evidence for the purpose of showing what kind of order the parties meant to designate by the words used in the contract.

Against the objection of plaintiff, the defendants were allowed to give in evidence certain accounts from their own books. Part of these accounts contained statements of subscriptions taken by other canvassers than plaintiff, and part contained statements of subscriptions obtained by plaintiff. There was no proof that the plaintiff had had any knowledge of the accounts of other canvassers, but I am of opinion they were admissible in proof of what was the meaning of the phrase that has been referred to. There was a probability that the circumstances being the same, the words would be used in the same sense in all the cases. As to the plaintiff's account in defendants' book, it was

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admissible for a like reason, and there was some evidence that the plaintiff knew what the entires were and made a settlement with reference thereto.

The judgment should be affirmed with cost.

O'GORMAN and INGRAHAM, JJ., concurred.

CANADA SHIPPING CO., RESPONDENT, v. WALTER
S. SINCLAIR, APPELLANT.

Order for examination.—Privilege of witness, when to be asserted.

The affidavit upon which the order for the examination of defendants to enable plaintiff to frame its complaint, was granted, showed that plaintiff, as common carrier, had a special property in certain goods which were stolen from it, and thereafter a portion of the same came into the possession of defendants, and that the action was brought to recover the same or its value; that plaintiff was unable to state the number of bales, their weight, etc.

Held, that in this case, the order should not be set aside on the ground that the testimony to be given would make defendants liable to indictment for receiving stolen goods, but defendant should be left to take the objection on the examination.

Before TRUAX and INGRAHAM, JJ.

Decided May 16, 1883.

Appeal from an order of the special term, denying motion of defendant to vacate an order for the examination of defendant to enable plaintiff to frame the complaint in this action.

The facts appear in the opinion.

Richard S. Newcomb, for appellant.—A party cannot be examined before trial when the examination would tend to show that he had committed a crime or misdemeanor, or would subject him to a criminal prosecution or to arrest (*Taylor v. Bruen*, 2 *Barb. Ch.* 301; *Leggett v. Postley*, 3 *Paige Ch.* 599; *Corbett v. De Comeau*, 44 *Super. Ct.* 306; *Yamato Trading Co. v. Brown*, 63 *How.* 283; *Henry*

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v. Bank of Salina, 1 *N. Y.* 83; Burbank v. Reed, 11 *Week. Dig.* 576; S. C., 1 *Civ. Pr. Rep.* 42; Phoenix v. Dupuy, 2 *Abb. N. C.* 146; Beebe v. Richardson, 2 *McC. C. P. Rep.* 319; Juillard v. Hamlin, *Id.* 321; Russ v. Campbell, 1 *Civ. Pr. Rep.* 41; Walker v. Dunleavy, 2 *McC. Civ. Pr. Rep.* 6). The court will not allow an examination to proceed where it is evident that the witness cannot be compelled to answer a single material question under it, as in this case (Corbett v. De Comeau, 44 *Super. Ct.* 312). In such case, to compel the defendant to take the oath and then reassert his privilege, would be an idle ceremony (March v. Davidson, 9 *Paige*, 586; Burgess v. Smith, 2 *Barb. Ch.* 276; Dykers v. Wilder, 3 *Edw. Ch.* 496).

C. Stewart Davison, for respondent.

BY THE COURT.—INGRAHAM, J.—From the affidavit on which the order for the examination of the defendant was granted, it appears that plaintiff had, as common carrier, a special property in thirty-one bales of rubber, which were stolen from the plaintiff about January 10, 1883, and some portion of which were in possession of defendant; that the action was begun to recover the return of the property or the value thereof from the defendant; and that it was impossible for plaintiff to allege the number of the bales that came into possession of the defendant, or the weight of the rubber, or to properly frame the complaint, without the examination of the defendant. On the affidavit, the defendant moved to vacate the order for the examination of the defendants, which motion was denied, and from that order denying such motion, the defendants appeal.

The ground upon which it is claimed that the order should be reversed is, "that the testimony to be given would make defendant liable to indictment for receiving stolen goods."

The possession of goods that have been stolen is not of itself a crime. The crime is only committed when a person buys or receives property stolen from another, knowing the same to have been stolen (2 *R. S. [Edm.]* 700 § 71).

Statement of the Case.

The right of a witness to object to answer a question which would tend to convict him of a crime is a personal privilege, and should be urged when he is asked the questions having such a tendency.

It is not sufficient ground for setting aside an order for his examination, unless it should appear that the testimony which the party seeks to obtain relates exclusively to facts, which if proven, would show that the witness was guilty of a crime.

In this case the object of the examination is to identify the goods stolen from the plaintiff which it is claimed came into the possession of the defendant.

That of itself would not be a crime. It would undoubtedly be one of the facts which it would be necessary to prove to convict of the crime of receiving stolen goods; but as the fact is consistent with the innocence of the defendant, I am of the opinion that the objection should be left to be passed on upon the examination itself (*Batterson v. Sanford*, 45 *Super. Ct.* 127).

The order should be affirmed, but without costs.

TRUAX, J.—I concur in the result, because I think that in this particular case the defendant should be left to take the objection upon the examination.

MARGARET W. DUYCKINCK, RESPONDENT, v. THE
NEW YORK ELEVATED R. R. Co., ET AL.,
APPELLANTS.

Amended answer—right to serve, waiver of.

The defendant's right to amend his answer as of course, is not waived by his service thereafter of notice of trial.

Under section 542 of the Code of Civil Procedure, the plaintiff has no right to demand that such an answer be stricken out, unless it appears that it was amended for purpose of delay.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided May 16, 1883.

Opinion per Curiam.

Appeal by defendant from order striking out amended answer of defendant.

Deyo, Duer & Bauerdorf, for appellants.

A. Edward Woodruff, for respondent.

PER CURIAM.—The amended answer was served within the twenty days named in the Code as the period within which an amended pleading may be served as of course. Before it was served, both parties had noticed the issues for trial. The respondent contends, that noticing an issue for trial, is a waiver by the party noticing of a right to thereafter amend as of course, under section 542 of the Code of Civil Procedure. Some cases cited support the proposition. These cases, however, do not so definitely and clearly state the law as it is stated in section 542. That section states when and why an answer otherwise properly amended as of course, may be stricken out. The plaintiff had no right to demand that the answer be stricken out, unless it is shown that the pleading was amended for the purpose of delay, and this is a matter not connected with considerations, that are attached to the service of notice of trial. The affidavit below did not charge that the amendment was for delay, although it made charges as to the ulterior purpose of the amendment. The order to show cause, did not state any ground of motion. The affidavit, however, for the defendants, was made by one of their attorneys, and averred that the answer was served in good faith and not for the purpose of any delay. The general circumstances seem to show that delay was not the purpose of the amendment. It is not meant to be said that the amendment was or was not frivolous, or that in a proper case, if the amendment is frivolous, it is not sufficient evidence of a purpose to delay. The decision is upon the facts of the case.

The order is reversed, with \$10 costs to appellant to abide the event.

Statement of the Case.

REBECCA DEADY v. THE BANK CLERKS' MUTUAL
BENEFIT ASSOCIATION.*Mutual benefit associations—Contracts.*

The defendant corporation was a mutual benefit association having for its object provision for the families, etc., of deceased members, out of a fund accumulated for the purpose, the by-laws providing that each member might, by written notice, designate to whom the payment should be made on his decease. Plaintiff's son, a member, so designated plaintiff, and the board of management of defendant issued to him a certificate agreeing to pay to her said sum on the son's death. Thereafter, without plaintiff's knowledge, her son surrendered said certificate to defendant, and received in place of it another certificate designating his wife as the person to whom such payment should be made, and soon after he died.

Held, that defendant was not bound to pay to plaintiff, the mother, the sum mentioned in the certificate, and that said certificate was not operative as a contract; and further, that the power to designate was not exhausted by one designation.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided June 2, 1883.

This action was tried before the court and a jury. The court ordered a verdict for the plaintiff, and then directed that the exceptions be heard in the first instance at the general term.

The facts of the case are as follows: The defendant was and still is a corporation, duly organized and existing under and by virtue of chapter 319 of the laws of the State of New York, passed April 12, 1848, and of the several acts amendatory thereof.

The object or business of said corporation is to relieve the necessities of aged and disabled, and to benefit the families of deceased officers and clerks, connected with the banks and savings' banks of New York and vicinity, and to provide by contribution of its members a fund out of which, there shall be paid to any person or persons previously designated by the deceased member to receive it, the sum of five hundred dollars, and a sum equal to fifty cents for every member of said association at the time of his decease, in addition thereto.

Statement of the Case.

On and previous to October 25, 1875, Richard J. B. Deady, of the city of New York (who was the son of the plaintiff), was and continued to be down to the time of his decease, a clerk in the employ of the Merchants' Exchange National Bank of the City of New York, and on or about said October 25, 1875, the said Richard J. B. Deady was duly admitted and accepted as a member of the said association, and then and there duly paid to said defendant the initiation fee provided by its by-laws, and continued to pay to said association all dues and assessments up to the time of his death.

The by-laws of said association provide that any member may by written notice to the board of management, designate to whom the sum due at the time of his death shall be paid.

On the day last aforesaid, Richard J. B. Deady, duly and in writing, and pursuant to the provisions of the by-laws of said association, designated this plaintiff as the person to whom the sum so due or to grow due, should be paid; and thereupon, the said defendant, at the request of said Richard J. B. Deady, issued and delivered a paper writing, of which the following is a copy, viz:

"No. 1284. Bank Clerks' Mutual Benefit Association of the City of New York. New York, October 25, 1875.

"This is to certify that Richard J. B. Deady, having paid the initiation fee as required by the constitution, is hereby created a member of the Bank Clerks' Mutual Benefit Association of the City of New York, and the said association hereby agrees to pay to his mother, Rebecca Deady, within thirty days after satisfactory proof of his death, or to himself, if permanently disabled, as many dollars as he may be entitled to under the provisions of the constitution regulating the same, provided he shall be a member in good standing at the time of his death or disability.

"O. D. BALDWIN, President.

Countersigned [Seal] "John H. BRENNAN, Corr. Sect."

Thereafter and on the same day, the said Richard J. B. Deady delivered said certificate to this plaintiff; thereafter

Defendant's Points.

and on January 26, 1882, the said Richard J. B. Deady died; at the time of his decease he was a member in good standing of said association; due notice of his said death was given to said association; at the time of his said death there was due from said association the sum of eleven hundred dollars.

On January 23, 1882, Richard J. B. Deady surrendered to the defendant the said certificate which had been given to him for safe keeping by the plaintiff and received in the place of it a certificate in which one Emma L. Deady, was designated as the person to whom the money should be paid. The said certificate was surrendered without the knowledge or consent of the plaintiff.

Further facts appear in the opinion.

John Callahan and James Flynn, for plaintiff.—By the provisions of its constitution and by-laws, and by the act under which it is organized, the defendant had full power and authority to make the contract or agreement set forth in the complaint (*Gunlach v. Germania Mec. Asso.*, 4 *Hun*, 339). Mr. Deady gave to the plaintiff that contract containing the provision making her the beneficiary; he could not thereafter surrender, cancel or change its effect without her consent (*Lemon v. Phoenix Mutual Life Ins. Co.*, 38 *Conn.* 294; *Whitehead v. New York Life Ins. Co.*, 63 *How.* 394; *Bliss on Ins.* § 339 [2d ed.]). The case of *Durian v. Central Verein* (7 *Daly*, 168), is not adverse to this view. The question there was as to the effect of a change made in the constitution of the society. In this case Mr. Deady, under the express provisions of the constitution and by-laws of the association, designated his mother as the beneficiary, and gave to her the contract or agreement making her such, thus placing in her hands and beyond his own control the means of enforcing her claim to the money.

Carlisle Norwood, Jr., for defendant.—The allegation of incorporation establishes that the defendant is not a life insurance company. The act under which it was founded

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is entitled "An act for the incorporation of benevolent, charitable, and scientific and missionary societies" (*L.* 1848, c. 319, 2 *R. S.* [7th ed.], 1701). A reference to the act (§ 1), will show for what purposes corporations may be formed under it. The character of this corporation, as shown in the complaint, is an association for benevolent purposes. Such a corporation cannot issue a policy of insurance, and its certificate is only a certificate of membership, containing an acknowledgment on the association's part, that it has received notice of the designation by the member of a person who is to be the recipient of its benevolence on the death of such member (*Durian v. The Central Verein, &c.*, 7 *Daly*, 169). The further provisions of the act so expressly restrict, corporations formed, that any contract in the nature of a policy of life insurance would be *ultra vires*. The act provides: "Every corporation formed under this act shall possess the powers and be subject to the provisions and restrictions contained in the 3d title of the 18th chap. of the first part of the *R. S.*" (2 *R. S.* [7th ed.] § 9, p. 1703). The provisions and restrictions referred to contain the following: "§ 3. In addition to the powers enumerated in the first section of this title, and to those expressly given in the charter or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given" (2 *R. S.* [7th ed.] p. 1531). It was perfectly competent for the defendant and Richard Deady to modify their original agreement and make any agreement satisfactory to both, and within the corporate powers of defendant (*Durian v. The Central Verein, &c.*, 7 *Daly*, 168, *ante*).

BY THE COURT.—SEDGWICK, Ch. J.—The complaint set out the by-law under which the certificate in question was made, in the following words: "that any member might by written notice to the board of management designate to whom the sum due at the time of his death shall be paid." So far as the meaning of these words must be considered in

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view of the general intent of the statutes, and the peculiarities of the case it was meant for, I am of opinion that the by-law means a designation from time to time, and the power of designation is not exhausted by one designation. To hold that it would, would be contrary to the exigencies of the most of the clerks. Say, for instance, as in this case, a young man becomes a member, shall he wait until he is about to die before he makes the only designation he is entitled to, or is he right in saying, I may die soon, and so I name the person that I think the right one now ; but I may marry and have children, and then it will be right to name them.

To me it is manifest that the certificate in question is not legally operative as a contract between the plaintiff and defendant. It has as one of its terms, implied if not expressed, the by-law that has been referred to. The defendant had no power to make any other contract than such as would be justified by the charter and by-laws. Such a contract would express the obligation of the defendant to the member to pay to the appointee as appointee. The present certificate is no further valid, than it embodies evidence that the plaintiff was the appointee. The rights of the plaintiff are not greater than they would be if she never had had the certificate, but depended solely upon the fact that she had been designated to the bond. It is not a negotiable instrument, or mercantile obligation. No consideration is implied. There is no estoppel. The plaintiff did not pay value for it. Granting that the member has the power to make an appointment that shall be irrevocable between him and the appointee, *e. g.*, because of some consideration paid, there is no presumption that such an arrangement was made in this case. As against a subsequent appointee, the burden of proof would be on a prior appointee.

For these reasons, I am of opinion that on the case as made, the defendants were not bound to pay the amount of the certificate to the plaintiff, and that defendants' exception should be sustained, the verdict set aside and a new trial ordered.

TRUAX, J., concurred.

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HENRIETTA F. FLAGG, RESPONDENT, v. THE
MANHATTAN RAILWAY CO., APPELLANT.*Negligence—unlighted stairway.*

In an action to recover damages for injuries caused by defendants' negligence, it appeared that plaintiff, while descending a flight of steps leading from a station of defendants' elevated railroad, which at the time was very dark, felt carefully with her foot for every step, until within a few steps of the ground, when thinking she was at the bottom she stepped out and was precipitated with great force. The negligence complained of was the failure of defendant to keep said stairway lighted.

Held, that it was a question for the jury whether or not plaintiff used ordinary prudence in believing, when she fell, that she was about to step from the last step, and that a verdict for plaintiff should be sustained.

Before SEDGWICK, Ch. J., and INGRAHAM, J.

Decided June 2, 1883.

Appeal by defendant from judgment for plaintiff entered on verdict, and from order denying motion for new trial, made upon judge's minutes.

The action was for damages to plaintiff, from the alleged negligence of defendants.

A motion was made to dismiss the complaint, which was denied, to which and various other rulings, exceptions were taken, the ground of which is stated in the opinion.

R. E. Deyo, for appellant.

W. P. Prentice, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—The most important question on the part of the appellant, relates to the obligation of the plaintiff to show that she was free from negligence that contributed to the injury. It is maintained that she did not give sufficient proof on this point to justify it being submitted to the jury.

The plaintiff's injury was a consequence of falling to the ground as she was descending a flight of steps leading from the defendants' elevated railroad. That part of the steps from which she fell was not lighted by the defendants.

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There had been a light, but it was not burning at the time of the accident.

The argument is as follows : that the plaintiff knew, long before she fell, that the descent was very dark ; that she felt ahead very carefully with her foot for every step ; that thinking she was at the bottom, when in reality she was three or four steps up, she stepped out, as though the bottom had been reached, and was precipitated with great force ; that if she had continued to feel ahead with either foot she would have been safe ; that her accident arose from her not feeling for the step ; that the fact was that, thinking she was at the bottom, she took a longer reach with her foot than she would have done if she intended to place it upon the step, and stepped beyond the edge of the next step and fell. She testified that she put her foot out, thinking she was surely at the bottom, and did not feel with her foot as she had before, when she was higher on the stairway.

As part of the argument, it is assumed that the evidence incontrovertibly shows that when she fell, she was three or four steps up, or thought she was. She said she was sure she was three or four steps up, but the general character of the testimony she gave as to the facts, shows that this was not an observation made by her at the time, but a reflection after the fall and when she was suffering and excited. At least, the jury could have so found properly, for the actual incidents that she testified to would have been supported an inference, that she did not fall three or four steps. For instance, as she fell, her hand touched a railing that was at the bottom, some distance from the last step. The jury could have found that she could not have touched this railing if she had fallen from a third or fourth step up.

The argument that has been stated would have no force, if it were a question for the jury as to whether or not she used ordinary prudence in believing that she was about to step from the last step. I think it was. She felt for the next step as long as she thought she was not at the bottom. There is nothing to indicate that persons of ordinary pru-

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dence would not under the circumstances, especially considering the number of steps she had already taken, believe that the last step had been reached. What ordinary prudence would have dictated was in my judgment a question for the jury.

The other exceptions have been examined, but do not call for a detailed statement. They are not sufficient to justify a reversal of the judgment.

Judgment affirmed with costs and order appealed from affirmed with \$10 costs.

INGRAHAM, J., concurred.

DANIEL V. ARGUIMBO, ET AL., RESPONDENTS, v.
GEORGE R. HILLIER, ET AL., APPELLANTS.

*Partnership—evidence of—agreement to share profits of single partner.—
General Term—duty of on appeal.*

A. and W. entered into articles of copartnership, providing that the profits and loss should be divided forty-five per cent. to A. and fifteen per cent. to W., thirty per cent. to be left undivided, and if no other disposition thereof were made, to be divided as above; also providing that said thirty per cent. "will be credited to A., and it is understood that where both parties of this contract agree, they may annually divide part or the whole of the profits." Some months thereafter, W. wrote to G. a letter which was signed by A. in his own name, offering G. of the said "mercantile contract . . . between W. and myself, thirty per cent. of the profits . . . of which I represent seventy-five per cent., you to answer . . . for any loss," etc. This proposal was accepted by G. in writing.

Held, that the above facts show that by agreement between both of the original partners, G. became entitled to thirty per cent. of the profits of the partnership business, and also liable for the losses, and therefore, became a partner in the firm, and not merely a sharer of the profits of A. It is the duty of the General Term, on appeal, to find whether or not the case as it was, supported the holding of the judge below, *e. g.*, that plaintiff was a partner—where the ground upon which the judge rested the holding as stated in the appeal book, is not sufficient to sustain it.

Before SEDGWICK, Ch. J., and INGRAHAM, J.

Decided June 2, 1883.

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Appeal from judgment entered on verdict of jury, and from order denying a motion for a new trial, made upon the judges' minutes.

A motion to dismiss the complaint was made and denied, and an exception taken. The facts appear in the opinion.

Huntley & Rowan, for appellant.

Scudder & Carter and *George A. Black*, for respondents.

BY THE COURT.—SEDGWICK, Ch. J.—One question only is presented upon this appeal. It is whether, on the trial, it was shown that the plaintiff Gomez was a copartner of the other plaintiff, doing business under the firm name of Arguimbau, Wallis & Co.

The following facts were proved: The plaintiffs, Arguimbau and Wallis, made in writing a copartnership agreement. In it, with the usual articles, was the provision that the profits and losses should be divided in the following manner, that is; 45 per cent. to Arguimbau and 25 per cent. to Wallis; that 30 per cent. should be left undivided; and if no other provisions as to them should be made, that they should be divided *pro rata* between Arguimbau and Wallis. This agreement was executed April 3, 1879. The business continued under it until the events next to be stated.

In November, 1879, the plaintiff Wallis wrote to Gomez a letter, which the plaintiff Arguimbau signed in his own name. It offered to Mr. Gomez, "of the mercantile contract effected for three years, from April 3, 1879, between Guillermo M. Wallis and myself, 30 per cent. of the profits that may result under the said contract, and of which I represent 75 per cent., you to answer with the credit you may have with the firm of Gomez & Arguimbau and Arguimbau, Wallis & Co., and also in person for any loss that may occur. I further answer you, for your subsistence, for the amount of £400 per annum." On the next day Mr. Gomez answered in writing, to the letter, that the contents of the

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latter "being in perfect conformity with our arrangement, I have merely to repeat that same are accepted."

These facts show that by agreement between both of the original partners, Mr. Gomez became entitled to 30 per cent. of the profits of the partnership business and also liable for the losses. He therefore, was a partner of the other two plaintiffs.

The argument to the contrary, proceeds upon the assertion that Mr. Gomez, under the letters that have been recited, became entitled, not to a share of the profits of the business, but a share of such profits as Mr. Arguimbau might be entitled to have out of the business. The only countenance for this, is the phrase "and of which I represent 75 per cent." An additional clause of the copartnership agreement, not yet given, clears this. That clause was that the 30 per cent. of the profits left undivided and not provided for "will be credited to Daniel V. Arguimbau and it is understood that, when both parties of this contract agree to, they may, annually divide part, or the whole, of the profits." This shows that this 30 per cent. of the profits did not belong to Mr. Arguimbau, and 75 per cent. were represented by him, inasmuch as he owned 45 per cent. and had credited to him 30 per cent., although in fact he did not own a right to the latter. The arrangement with M. Gomez was in reality a provision as to the disposition of the 30 per cent. which the copartnership agreement, expressed as a possibility in the future.

It was argued that the judge below erred in holding that the evidence proved Mr. Gomez to have been a partner, inasmuch as, by the case, he declared that he made such ruling upon the documents alone, apart from any extrinsic evidence, and without extrinsic evidence the papers did not show that Mr. Wallis had agreed to the arrangement with Mr. Gomez. It is not possible to believe that the judge meant to say that, in connection with the papers, he disregarded the significant fact that Mr. Wallis had written one of the letters. But if he had so meant, it

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would be the duty of the general term to find whether the case as it was, did not support his conclusion.

Judgment affirmed with costs, and order appealed from affirmed with \$10 costs.

INGRAHAM, J., concurred.

ROBERT E. AUSTIN, ET AL., RESPONDENTS, v. LOUIS
HARTWIG, ET AL., APPELLANTS.

Evidence.—Posting of letter.—Experts.—Sale of Merchandise by vendors for vendee's benefit—requisites of.

Where a witness swears that he addressed a letter to the defendants, and put it in the general post office, and the sole objection made to the reading of said letter in evidence, is that there is no proof of its receipt, its admission is correct, and such ruling cannot be attacked on appeal on the ground that it was not shown that the address was correct nor that the postage was paid.

Where the question as to which an expert is called to testify is as to the marketable quality of certain merchandise, *e. g.*, sauerkraut, and he testifies that part of his business is to deal in, and buy and sell it, and to examine it to see if it is fit for sale, his testimony as properly admitted though he states therein, of himself, that he is not an expert.

Where the vendor in an executory contract for the sale and delivery of merchandise, upon the vendee's refusal to accept the same, elects to sell for the vendee's benefit, the only requisite to such a sale, as the measure of the rights and injury of the vendee, is good faith, including a proper observance of the usages of the particular trade.

The presence of the vendee at the sale, not objecting, is sufficient evidence of its regularity, in an action by the vendor to recover the balance of the contract price.

In such an action, the vendee will not be deemed harmed by the mere fact that the vendor bought in the merchandise, by bidding above others present at the sale.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided June 2, 1883.

Appeal by defendants from judgment entered on verdict of jury, and from order denying motion for new trial made upon the minutes.

Appellants' Points.

• The action was brought to recover damages for the refusal of the defendants to accept 200 casks of sauerkraut, under a written agreement, by which they bought from the plaintiffs that number of casks, to be shipped by a November steamer from Hamburg to Bremen, the goods to be of good merchantable quality.

It appeared that upon the arrival of the goods, the defendants had accepted under the contract 113 of the casks, but refused to receive the remainder, or 87 casks.

The defense was that the sauerkraut tendered by the plaintiffs to the defendants was not of a good and merchantable quality on arrival.

The plaintiffs, after defendants' refusal to accept the 87 casks, gave notice to the latter that the property would be sold at public auction, at a time and place specified; and it was, at such time and place, sold at auction. The plaintiffs claimed as damages the contract price for the 113 casks and interest, and the difference between the contract price of the 87 casks and the price at which they were sold at the auction.

On the trial it was admitted that defendants were liable for the contract price of the 113 casks. As to the 87 casks, the court left to the jury but one question, viz.; whether the 87 casks contained good and merchantable sauerkraut at the time of tender.

The jury found for plaintiffs. The court granted plaintiff an extra allowance of five per cent. on the whole amount, including the 113 casks received by defendants. Further facts, and the exceptions, appear in the opinion.

J. A. Englehart, attorney, and *A. J. Dittenhoefer*, of counsel, for appellants.—The refusal to dismiss the complaint, and to charge as requested, was erroneous. The effect of the acceptance of a part of the casks, at the most, was to entitle plaintiffs to recover only the value of the 113 casks retained by defendants (*Avery v. Wilson*, 81 *N. Y.* 341; *Shields v. Pettie*, 4 *Ib.* 124; *Mayor v. Pyne*, 3 *Bing.* 285; *Oxendale v. Wetherdell*, 9 *B. & C.* 386; *Catlin*

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v. Tobias, 26 *N. Y.* 217). And it has been doubted whether the contract price of the goods delivered could be recovered in an action on the contract, under the circumstances of this case (*Smith v. Brady*, 17 *N. Y.* 173).

Until plaintiffs proved that the special and requisite sauerkraut arrived, in a November shipment, and were of a good and merchantable quality, and in good condition on arrival, according to their contract, they would not recover (*Welsh v. Gossler*, 89 *N. Y.* 540; See *v. Bernheimer*, 38 *Super. Ct.* 40; *Dike v. Rietlinger*, 23 *Hun.* 41; *Shields v. Pettie*, *supra*).

The court erred in refusing to permit the question as to the fairness of the auction sale to go to the jury. In the case at bar the evidence all tended to show that the purchase was in fact by the plaintiffs, in the name of their employee, Lochman. For the purposes of such sale the defendants were the principals, and the plaintiffs acted as their agents, and as such agents, were bound to act with reasonable care and diligence, and in good faith (*Dustan v. McAndrew*, 44 *N. Y.* 78; *Mason v. Decker*, 72 *Id.* 595). As defendants' agents they had no right and could not purchase the property themselves (*Bain v. Brown*, 56 *N. Y.* 285; *Budenbecker v. Lowell*, 32 *Barb.* 9; *Comstock v. Comstock*, 57 *Id.* 453). And this doctrine applies whether the sale be public, private, or a judicial sale (*Moore v. Moore*, 5 *N. Y.* 256). Not only in cases where the strict relation of principal and agent, or trustee and cestui que trust, exists, is this principle applied, but in every case where the duty to perform in reference to the sale is inconsistent with that of purchaser (*Torrey v. Bank of Orleans*, 9 *Paige*, 649; *aff'd*, 7 *Hill*, 260; *Bennett v. Austin*, 81 *N. Y.* 308). If the sale was to the plaintiffs clearly, it was not a fair and reasonable one, in fact, no sale upon which to base this action to recover the difference in price, no matter what contrivances were concocted or forms gone through to cover up the nature of the transaction (*Caufield v. Minneapolis Agr. and Mech. Asso.*, 15 *Reporter*, 260, issued Feb. 28, 1883; *Bain v. Brown*, *supra*). It was a question of fact for the

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jury, on all the circumstances, to say whether the sale was fair (*Mintown v. Allen*, 3 *Sandf.* 50).

The court erred in admitting the evidence of the alleged experts. The opinion of a witness as to quality or condition of an article is admitted very reluctantly; for it is the province of a jury to draw the conclusions from the facts; and by the evidence of an expert his conclusion or opinion is merely given, which the jury is bound to adopt; and only in a case where it appears that the witness possesses peculiar qualifications to speak on the subject, not possessed by a man of ordinary experience and intelligence, will the opinion of an expert be taken (*Harris v. Panama R. R. Co.*, 3 *Bosw.* 7; *Terrpenning v. Corn Ex. Co.*, 43 *N. Y.* 279). In *Chamboret v. Cagney* (35 *Super. Ct.* 474), Chief Justice SEDGWICK held that when the only evidence to lay foundation for the opinion of an expert was that he had purchased some of the articles, it was improper to admit the evidence; citing *Terrpenning v. Corn Exchange Co.* (*supra*).

The court erred in granting an extra allowance upon the whole verdict. There was no controversy as to the defendants' liability for the 113 casks; therefore said amount was not "involved" (*Code*, § 3253). The amount of the recovery or claim is not the measure, but the limit, of the allowance (*People v. N. Y. Cent. Co.*, 30 *How.* 148). Again, as to these 113 casks, if there was any controversy, it was certainly not difficult or extraordinary. And where there is an offer to allow judgment, no extra allowance can be granted as to the sum covered by the offer (*Penfield v. James*, 56 *N. Y.* 659; *Astor v. Palache*, 49 *How.* 231; *Struthers v. Pearce*, 51 *N. Y.* 365). This error can be reviewed and corrected by this court (*People v. N. Y. Cent. Co.*, *supra*).

E. H. Benn, for respondents.

BY THE COURT.—SEDGWICK, Ch. J.—The counsel for appellant argues that the plaintiffs were not entitled to recover, inasmuch as they did not show on the trial that the goods were of a "November shipment," stipulated for in

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the contract. This matter was not within the issues. The answer, after stating the agreement for the sale and delivery of the 200 casks, "November shipment," avers "that the said sauerkraut tendered by the said plaintiffs to these defendants was not of a good and merchantable quality on arrival; on the contrary, the said sauerkraut was of an inferior, bad, and unmerchantable quality." The assertions imply that, as a fact, casks of November shipment, to the number named in the contract, had been tendered, and that the only objection made by the defendants was that the article was not of a merchantable quality.

This condition of the pleading is also an answer to the position that the court erred in allowing a copy of a letter to be read in evidence which contained a statement that the plaintiff tendered to the defendants a certain part of the shipment. If there were error, it did not injure the defendants, as they admitted the tender of the whole. But there was no error. The witness who produced the copy swore that he addressed the letter to the defendants, and put it in the general post-office. The sole objection was that there was no "evidence that the defendants ever received it." The particular objections now urged, are that the witness had not sworn that the address was correct, and that a postage stamp had been placed on the envelope. If these had been made upon the trial, the plaintiff would have had an opportunity to remedy what was probably an unintentional omission. The objection, as made, was not correct. The plaintiffs were not bound to show by direct evidence that the defendants ever received the letter; and, apart from the specific matters that were not alluded to in the objections, the posting of a letter in the mail is evidence as to the receipt of it by the party to whom it is addressed.

There were objections made to allowing certain witnesses to testify as to the quality of the sauerkraut. The ground stated was, that it was not shown that they were experts as to the quality. The only thing that tends to support the objection is, that some of the witnesses said, as to themselves, they were not experts. This was but an opinion,

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and the facts they testified to, that part of their business was to deal in sauerkraut, to buy and sell it, to examine it to see if it were fit for sale, showed they were competent to speak of the merchantable quality of the lot in question. The point did not involve the intrinsic quality, but only the marketable quality.

It is further urged as error, that the court refused to submit to the jury the question whether or not a certain auction sale was a fair sale. The action of the court in this respect was correct, because the evidence incontrovertibly proved that it was a fair sale, after notice of the sale to the defendants, and one of the defendants being present at the sale, making no objection to the proceeding or claim that they should be conducted in any other way than the one used. In *Pollen v. Le Roy* (30 *N. Y.* 557), it is said that the only requisite to such a sale, as the measure of the right and injury of the party, is good faith, including the proper observance of the usages of the particular trade.

The only specific objections taken to the fairness of the sale were grounded upon the following facts: The eighty-seven casks were offered for sale in the following manner: Five casks were put up, with the privilege of the buyer taking the whole lot. There were five bids; and when the five casks were bid in by a Mr. Lochman, he exercised his option of taking the whole. The defendant, who was present, denied in his testimony that there was such an arrangement as the kraut being sold in five lots, with the option of the buyer to take the balance, or that he heard of the announcement of the sale of five casks, with an option to take the whole. On this conflict, if it were one, the preponderance of proof was with the plaintiffs. If however, the defendants were correct, the result is the same. The transaction did not appear to be against the usage of the trade. It did not appear that a sale of smaller lots was necessary to obtain full value. If the whole 87 casks were sold at once, that quantity was less than the purchase of the defendants in this case. The presence of the defendants at the sale, not objecting, is sufficient evidence of the regularity of

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the sale. For the plaintiff would have been bound to attend to any reasonable suggestion made by him.

Mr. Lochman, who bought in the goods, was a salesman for the plaintiffs. He, however, was in business for himself, as a retail dealer. At the auction-sale he was not required to pay the price of the goods. He kept them for some time, and then, having an account with the plaintiffs, the price was credited to him, and the plaintiffs sold them for their own account, Lochman making some of these sales. The account in which the price was credited was the account Lochman had with the plaintiffs in respect of purchases for his retail business. Lochman testified that he did not receive the goods from plaintiffs' premises when the auction sale was had. He also testified that he bought for himself. There was nothing to discredit this testimony, and upon it the court was not bound to charge the jury that they could consider, in determining whether the sale was fair, that Lochman was an employee of the plaintiffs, and the other facts, that have been already given; as to his bid and dealing with the property. There was no reason to disbelieve him, and in his testimony the facts alluded to had no tendency to show that in reality the plaintiffs bought the goods through Lochman. And again, the fact of Lochman or the plaintiffs bidding above others was not hurtful to defendants. If they had not bidden, the goods would have been sold to such lower bidder as would take the goods, and there would have been an increase of the damages for which the defendants would be responsible.

Upon the evidence and pleading, the only question for the jury was as to the quality of the contents of the 87 casks, and this was submitted in a correct way.

It is not intended to hold that the defendants, were not liable when, after a tender of the whole, they accepted part as a good delivery under the contract, if such was the fact.

When it is perceived that the defendants made a contest as to their liability as to any part of the goods, in their answer, there is no reason for disturbing the action of the court as to the allowance.

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Judgment affirmed with costs, and order appealed from affirmed with \$10 costs.

TRUAX, J., concurred ; INGRAHAM, J., concurred in the result.

ARCHER OYSTERBANK, APPELLANT, v. WILLIAM GARDNER, ET AL., RESPONDENTS.

Negligence.—Right to maintain hatchway—duty as to public—implied invitation to enter premises.—Highway.

Plaintiff, who was nearly blind, turned from the street upon which he was walking, supposing he had reached a certain house to which he intended to go, and went up steps belonging to defendants' warehouse, through a doorway, and fell into a hatchway close to the door.

Held, that defendants, having a right to maintain said hatchway with the door, as a well known and ordinary business appliance, the burden of proof was on plaintiff to show negligence; that defendants were bound to use due care to protect from falling into the hatchway persons coming into that part of the building by their invitation, express or implied, but that the existence of such steps and doorway was not sufficient to establish an implied invitation, in the absence of evidence that the appearance of the door was like that used for the entrance of persons ; also, that plaintiff's defective vision did not affect defendants' obligation in the premises.

Further held, upon consideration of the facts showing the relation of the hatchway to the street, that the case does not come within the rule permitting a recovery by a person who, proceeding on the highway with ordinary care, inadvertently steps from it into an excavation made by defendants so near the highway that such an occurrence might reasonably be expected.

Before SEDGWICK, Ch. J., and INGRAHAM, J.

Decided June 2, 1883.

Appeal by plaintiff from judgment that his complaint be dismissed.

The action was for damages from negligence. The plaintiff was a seller of newspapers. He walked along Mott

* See *Weinhold v. Acker*, *ante*, p. 182.

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street, intending to go into an eating-house on that street. His sight was imperfect; when he had gone near the eating-house, about nine feet from it, thinking that he had reached it, he turned and went up steps that, in fact, belonged to defendants' warehouse. He proceeded through the doorway, and fell into and through a hatchway that was close to the door.

Further facts appear in the opinion.

Peet & Fuller, for appellant.—Defendants gave a general license and an invitation to the public to enter; and it was their duty either to keep the entrance in a safe condition or to give warning of danger therein; and if they omitted to perform this duty they are liable for the consequences (3 *Bl. Com.* 2111; *Sweeny v. O. C. & N. R. R. Co.*, 10 *Allen*, 369; *Elliott v. Pray*, 10 *Id.* 379; *Corby v. Hill*, 93 *E. C. L.*, 4 *C. B.* [*N. S.*] 556; *Beck v. Carter*, 68 *N. Y.* 283; *Swords v. Edgar*, 59 *Id.* 31; *Mayor, &c. v. Williams*, 15 *Id.* 502; *Mullaney v. Spence*, 15 *Abb. Pr. N. S.* 323, and cases cited; *Bird v. Holbrook*, 4 *Bing.* 628; *Barnes v. Ward*, 9 *C. B.* 417; *Sher. & R. on Neg.* § 508).

Plaintiff was not guilty of contributory negligence, and therefore defendants owed him this duty as one of the public. Although plaintiff, because of his mistake, might be regarded as a technical trespasser, yet that would not deprive him of his rights nor release defendants from their duty (*Brown v. N. Y. C. R. R. Co.*, 34 *N. Y.* 410; *Loomis v. Terry*, 17 *Wend.* 500; *Mullaney v. Spence*, 15 *Abb. Pr. N. S.* 323; *Barnes v. Ward*, 9 *C. B.* 420; *Whirely v. Whiteman*, 1 *Head Tenn.* 610; *Lynch v. Nurdin*, 41 *E. C. L.* 342; *Stout v. Sioux City & Pacific R. R. Co.*, 17 *Wal.* 657; *Birge v. Gardner*, 19 *Conn.* 507; *Bird v. Holbrook*, 4 *Bing.* 628; *Ela v. McConihe*, 35 *N. H.* 275). His trespass was not the controlling act, and therefore of no importance (*Harris v. Ubelhoer*, 75 *N. Y.* 177).

Thornton, Earle & Kiendl, for respondents.—So long as the owner of property violates no duty to others, or to the

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State, he cannot be called in question for the manner in which he uses it ; and if in the lawful exercise of his right to so use it, another is injured, he is not liable. That defendants are not liable, see *Victory v. Baker*, 67 *N. Y.* 366. *Nicholson v. The Erie Railway Co.*, 41 *Id.* 525, holds the same doctrine (Also see *Hounsell v. Smyth*, 97 *Eng. Com. Law*, 731 ; *Thompson v. Grand Trunk Railway Co.*, 37 *U. C. Q. B.* 40 ; *Pierce v. Whitcomb*, 48 *Vt.* 127, 21 *Am. R.* 120 ; *Severy v. Nickerson*, 120 *Mass.* 306, 21 *Am. R.* 514 ; *Bush v. Brainard*, 1 *Cow.* 78 ; *Sutton v. N. Y. C. & H. R. R. Co.*, 66 *N. Y.* 243 ; *McAlpin v. Powell*, 70 *Id.* 126 ; *Ill. Central R. R. v. Godfrey*, 71 *Ill.* 500, 22 *Am. Reps.* 112 ; *Gramlich v. Wurst*, 86 *Penn. St.* 74, 27 *Am. Reps.* 684 ; *Morrissey v. Eastern R. R. Co.*, 126 *Mass.* 377, 30 *Am. R.* 686).

BY THE COURT.—SEDGWICK, Ch. J.—The burden of proof was upon the plaintiff to show negligence on the part of defendants. They had the legal right to make and maintain the hatchway in their own building. The hatchway was of an ordinary and well known kind of appliance to the management of business. The defendants had a right to suppose that anyone entering their store would expect to find the hatchway in the place where it was. They were bound to use due care to protect from the risk of falling through the hatchway anyone who should come into that part of the building by their invitation, express or implied.

The plaintiff claims that he did enter by implied invitation. To succeed on this point, he must prove the facts from which the invitation may be implied. The only facts he proves are, that there were steps leading to the door, that there was the door, and the hatchway a short space within the door.

As we have before said, it is generally known that there are doors for the uses of hatchways, and it is as well known that there are other doors for the entrance and exit of persons on business. The mere fact that there are doors leading to hatchways does not give an invitation to enter,

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unless it is also shown that the appearance of the door and door-way is like that of those generally used for the entrance of persons. In this case there was no proof of what the appearance of the door and door-way was. To assume that it was such as would justify a person believing that he might enter, would be to assume, and not to prove, that the defendants were negligent.

Unhappily, the plaintiff was nearly blind, and for that reason could not, or did not, observe the appearance of the door and door-way. But I apprehend that this blindness did not increase or lessen the duty of the defendants in the matter now in view. The plaintiff had no right to enter the defendants' house, without the permission or implied invitation of defendants; and defendants had the right to exclude such as they did not, in fact, permit to enter. Whatever, then, the condition of the plaintiff, he knew he had no right to enter, unless, in fact, there was an appearance of invitation from the defendants; and in making his case on the trial, he did not show any facts that tended to prove an appearance of invitation. The proof was, that the plaintiff did not inadvertently even go up the steps, but entered intentionally, because of a mistaken calculation as to the distance he had gone. This, again, does not affect the measure of the defendants' obligation to duly protect such persons as were on their premises, in the vicinity of the hatchway, by their consent. So far as the plaintiff's claim was placed upon his being invited to enter the door-way, the proof failed to show that there was an invitation.

The plaintiff's claim was also placed, in the argument of the appeal, upon the relation of the hatchway to the street or highway. The foot-step leading to the door-way was eight feet distant from the curb. There were two steps up; then a flat stone about four feet wide, and then one other step to the door-way. The hatchway was close to the door. These facts show that this case is not within the rule that permits a recovery by a person who, proceeding on the highway, with ordinary care, inadvertently steps from it into an excavation made by the defendants so near the

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highway that the latter might reasonably anticipate such an occurrence. The departure by the plaintiff from the street was intentional, and it was his purpose to enter a house. The defendants were not bound to provide against an intentional use of their premises, which had not been permitted by them, as we have already held.

In view of these considerations, it may be said, as to the plaintiff's participation in the occurrence, that being a business part of the city, where doors with hatchways having access from the street are frequent, and doors for the entrance of persons are frequent, he had no right to assume that because there was a door, it was of the latter kind.

Judgment affirmed, with costs.

INGRAHAM, J., concurred.

THE SECOND AVENUE R. R. Co., RESPONDENT, v.
SOLOMON MEHRBACH, APPELLANT.

Corporation—powers of officer—effect of specific authority.—Conversion.

Where the transaction of certain business for the corporation by one of its officers is the subject of specific authorization by resolution, such resolution furnishes the measure of said officer's authority in regard thereto, though the matters in question may be comprehended by general powers conferred upon him.

Accordingly, where certain instruments in the form of bonds, signed and sealed by the proper officers of plaintiff, but not delivered, were entrusted to defendant, the president of the company, under a resolution directing him to sell the same at a certain price, and said defendant loaned them to one F., for the purpose of enabling F. to raise money to pay the company for certain of its bonds for which F. had subscribed and had not paid,—*Held*, a conversion by defendant, and that the question of his general powers as president was immaterial.

Before SEDGWICK, Ch. J., TRUAX, and INGRAHAM, JJ.

Decided June 2, 1883.

Appeal from judgment entered on verdict for plaintiff directed by court.

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The facts appear in the opinion.

Smith, Allan & Smith, for appellant.

Hutchins & Platt, and *Austin G. Fox*, for respondent.

—The defendant Mehrbach, in allowing the defendant Fellows to obtain possession of and carry away the seven bonds in question, was guilty of a conversion of the bonds.

Trover lies by the maker of a promissory note for its conversion (*Decker v. Mathews*, 12 *N. Y.* 313, 319). This is so whether the defendant has transferred the note or not (*Thayer v. Manley*, 73 *N. Y.* 305, 308). The allegation that the defendants converted and disposed of the bonds to their own use is sufficient (*Decker v. Mathews*; *Thayer v. Manley*, *supra*). And it is not necessary to prove that the defendants actually appropriated the proceeds to his own use, or derived any benefit from the use of the bonds (*Reynolds v. Shuler*, 5 *Cow.* 323; *Connah v. Hale*, 23 *Wend.* 462; *Murray v. Burling*, 10 *Johns.* 172; *Bristol v. Burt*, 7 *Id.* 254). The conversion was complete at the moment of the unlawful delivery of the bonds to the defendant Fellows, by the consent of the defendant Mehrbach. The action is sustained by showing possession in the plaintiff and the wrongful delivery by the direction or assent of the defendant Mehrbach (Cases cited *supra*; *Ely v. Ehle*, 3 *N. Y.* 509). Nor is a wrongful intent an essential element of the conversion (*Boyce v. Brockway*, 31 *N. Y.* 490, 493; *Poucher v. Blanchard*, 86 *Id.* 256). The delivery of the seven bonds to the defendant Fellows was unauthorized. But, whatever might have been implied from the alleged custom of the president to pledge the company's bonds at his discretion, in order to raise money for the company, still, in regard to the bonds in question, he was controlled by an express resolution of the board of directors to sell the bonds, and a violation of that instruction was a conversion (*Laverly v. Snethen*, 68 *N. Y.* 522).

BY THE COURT.—SEDGWICK, Ch. J.—The action was for damages for the conversion of what were called in the

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complaint, bonds. The instruments, seven in number, were in the form of bonds, signed and sealed by the proper officers of the plaintiff, but had not been delivered. While they were in this condition, the defendant, who was president of the plaintiff, loaned them to one Fellows. Fellows had subscribed for twenty-five of the same kind of bonds, had received them, but had not paid the price of them in full. The purpose of the loan was to enable Fellows to raise money with which to pay for the twenty-five bonds in full. This was conversion by the defendant. It was an appropriation by the defendant to himself of the property of the plaintiff.

It was claimed on the trial that the proof showed that the loan of the seven bonds to Fellows was authorized by the plaintiff in general powers that had been conferred by them on defendant, and also that this special transaction had been ratified by the plaintiff. There was no testimony tending to show any ratification. As to the claim of authority under general power, it is not necessary to ascertain what general powers the defendant had, for his powers as to bonds like those in question were the subject of specific authorization by resolution. That resolution conferred on him authority to sell at a certain price. There was no proof that this resolution had become in any way inoperative or unobserved by tacit consent. The loaning to Fellows was not a sale. It was not a transaction, the object of which was a return of money for the loan. It was solely for the benefit of Fellows, to enable him to pay the subscription price of the twenty-five bonds.

There was no error in the proceedings on the trial, and the court was right in directing a verdict for plaintiff.

Judgment affirmed, with costs.

TRUAX and INGRAHAM, JJ., concurred.

Appellant's Points.

ALFRED A. SPARKS, APPELLANT, v. GEORGE W. BASSETT, RESPONDENT.

Landlord and tenant—covenant to repair—damages for breach.

Where the landlord covenants with the tenant to make certain repairs upon the demised premises on or before a specified date, the damages to the tenant for failure to fulfil such promise are to be assessed as of the time of the breach, viz., the date specified for making said repairs; and where the tenant has suffered no special injury, they are limited to such an amount as would compensate him for himself making such repairs, notwithstanding that he may have been obliged to pay a third person damages caused after said date by failure to make such repairs.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided June 2, 1883.

Appeal by plaintiff from an order granting motion for new trial, made by defendant after verdict for plaintiff.

The action was for damages for a breach of covenant to repair. The plaintiff had a verdict. The defendant moved for a new trial upon the minutes of the judge. The motion was granted, and the plaintiff appeals from the order entered on this motion.

The facts appear in the opinion.

Harrison & Langdon and Abner C. Thomas, for appellant.—In the case at bar the testimony uncontradictedly shows that the tenant had no notice or knowledge whatever of the condition of the overflow pipe till the damage had occurred. In all cases, however, where the damage has resulted from a reliance by the tenant upon the performance of an agreement to repair by the landlord, the entire amount of damage has been awarded (*Walker v. Swayze*, 3 *Abb. Pr.* 136; *Beach v. Crane*, 2 *N. Y.* 86; *Myers v. Burns*, 35 *Id.* 269; *Hexter v. Knox*, 63 *Id.* 561, reversing S. C., 7 *J. & S.* 109; *Middlekauff v. Smith*, 1 *Md.* 343). There is a class of cases in principle very similar to the one at bar, where a municipal corporation has been compelled to pay damages caused by a breach of duty due to it from some individual

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or corporation. In such a case the real delinquent is held liable for all of the damage, including the costs and expenses of the litigation (*City of Brooklyn v. Brooklyn City R. R. Co.*, 47 *N. Y.* 475, and cases cited; *City of Troy v. Troy & L. R. R.*, 49 *Id.* 657; *City of Rochester v. Montgomery*, 72 *Id.* 65, *affi'g* 9 *Hun*, 394).

James K. Hill, Wing & Shoudy, for respondent.—The covenant was broken, if at all, on January 1, 1881. The only damages which the plaintiff was entitled to recover for breach of the covenant, was what it would have cost him to have put the plumbing in the condition that the contract required. The injury which was received by the tenant on the ground floor by reason of the negligent use of the plumbing by the plaintiff was too remote. No such measure of damages was within the purview of the contract (*Dorwin v. Potter*, 5 *Den.* 306; approved in *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 *N. Y.* 482, 483; also, in *Flynn v. Hatton*, 43 *How.* 333. See, also, *Benkard v. Babcock*, 2 *Rob.* 175, 181, 182; *Arnold v. Clark*, 45 *Super. Ct.* 256; *Cook v. Soule*, 56 *N. Y.* 423; *Meyers v. Burns*, 35 *Id.* 273; *Walker v. Swayzee*, 3 *Abb. Pr.* 138; *McAdam, Landl. & T.* 449, 2d ed.). In *Hargous v. Albon* (5 *Hill*, 474), Judge COWEN, illustrating this subject, says: “Dr. Franklin’s case of the defective horse-shoe nail, which resulted in the loss of the shoe, and thence in the loss of the horse, is an excellent lesson in private economy, but in an action against the farrier it would not have done to have looked beyond the loss of the shoe. To have charged him with accidental consequences would have worked his ruin” (See, also, *Sedgw. Dam.* 79, 4th ed.).

BY THE COURT.—SEDGWICK, Ch. J.—The defendant, in his agreement of letting to plaintiff, covenanted to make “the following repair in said premises before the 1st January, 1881, on the first floor; to do the work in the water-closet and wash-stand, and put the plumbing in perfect condition.” The plaintiff gave evidence to show that the

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defendant did not, at any time, make the repairs ; that in August of 1881, the wash-basin, by reason of some defect of plumbing, was overflowed, and the water ran down into a lower floor, occupied by another person, and damaged some of his goods ; that the damages were claimed from the plaintiff, and that he was obliged to pay \$75 to satisfy the claim. On the trial, the plaintiff recovered the \$75 so paid, and also \$75 as the amount paid to his lawyer for services in settling the claim for damages.

It was agreed substantially, on the argument, that there should not have been any recovery for the amount paid by the plaintiff to his counsel for his services.

As to the damages which came from plaintiff's payment of a claim against him, I am satisfied that the judge below, in granting a new trial, took the correct view. Such damages were not within the contemplation of the parties. The covenant was not meant to be an indemnification of the plaintiff against the consequences of an overflow during the whole of the term. The damages were to be assessed as of the time of the breach, in January 1, 1881, and would consist of compensation to the plaintiff for himself making the repairs. The rule in *Dorwin v. Potter* (5 *Den.* 306) is applicable to such a case, as is stated in the opinion of the court in *City of Brooklyn v. Brooklyn City R. R. Co.* (47 *N. Y.* 475).

An extract from the last cited case gives light to another view of the facts. It is, "and the covenantee, in the covenant to keep in repair is within the rule in *Hamilton v. McPherson* (28 *N. Y.* 72) and, being in the care and use of the property, bound himself to take measures that the disaster of his covenantor shall be as small as may be." This intimates that it was incumbent upon the plaintiff to put the plumbing in order himself, especially as to damages to a third person that come from his own negligence.

The order granting a new trial should be affirmed, with costs.

TRUAX and INGBAHAM, JJ., concurred.

Statement of the Case.

**BENJAMIN LAWRENCE, ET AL., APPELLANTS, v.
CHARLES FOXWELL, RESPONDENT.**

Pleading.—Action to enforce liability fraudulently contracted—Code, § 549, sub. 4.—Dismissal of complaint.

It is not the intention of the Code to permit judgment for fraud in an action under subdivision 4 of section 549, upon the general allegation that there was fraud; and where the complaint, after duly setting forth a cause of action on contract, states "that the defendant was guilty of a fraud in contracting and incurring liability, in that," etc., and there are no averments of facts which constitute fraud, such complaint should be dismissed on the trial, upon the ground that it does not state facts sufficient to constitute a cause of action.

A complaint which states that at the time of the purchase of the goods by defendant, and to induce plaintiffs to sell them to him on credit, he stated that he had sold the same to another, etc.; that, relying upon this, plaintiffs made the sale; and that said goods had not been so sold by defendant, etc., does not state a good cause of action for fraud, there being no allegation that the representations were fraudulently made, or with knowledge that they were not true, or with intent to defraud.

Before SEPGWICK, Ch. J., TRUAX, and O'GORMAN, JJ.

Decided June 2, 1883.

Appeal by plaintiff from judgment entered upon direction of judge at trial term that the complaint be dismissed, upon the ground that it did not state facts sufficient to constitute a cause of action. The complaint, after duly stating a cause of action on contract, proceeded: "That the defendant was guilty of a fraud in contracting and incurring the liability, in that, on or about the 26th day of October, 1881, he called upon the plaintiffs, at their place of business in the city of New York, and applied to the plaintiffs to purchase from them twenty-five cases of paper; and, to induce said plaintiffs to sell him said goods on credit, stated to said plaintiffs that he had sold the said paper, and that he would pay for the same early in November, but that the goods should be billed to him on thirty days' credit, to enable him to collect from the party to whom he had sold

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the same, and that the said goods should be shipped by the New England Transportation Company to Boston, addressed to George C. Goodwin & Co. . . . "That plaintiffs relied solely upon the representations of defendant that he had sold the said paper to George C. Goodwin & Co., and shipped the goods as requested by the defendant, and billed the same at the agreed price of nine dollars per case, payable in thirty days. . . . That said goods were not in fact sold to George C. Goodwin & Co., or any other person or persons at the time said defendant so represented and stated, but that subsequently the said defendant sold thirteen of the said twenty-five cases to George C. Goodwin & Co., at eight dollars per case, and received the money therefor on or about the 28th October, 1881."

Ellis S. Yates, for appellant.—The complaint is sufficient, under section 549, subdivision 4, Code of Civil Procedure. It is alleged in the complaint, as required by the Code, "that the defendant was guilty of a fraud in contracting and incurring the liability." The Code substituted for the averments requisite under the common law practice, in complaints of fraudulent representations under this section, a mere bare allegation of fraud. The section refers not to the sufficiency of the pleading, but solely to the maintaining of the order of arrest. The remedy, if the complaint had not stated that the defendant was guilty of a fraud in contracting or incurring the liability, was not the dismissal of the complaint, but simply the vacating the order of arrest. The statute says, where an allegation of fraud is made, unless he proves the fraud, the plaintiff cannot recover; but here, it is contended, not that the fraud was not proved, but that no allegation of fraud was made: if this were true, then the order of arrest must fall; that is the only remedy and the only penalty. The whole intent and purview of adding subdivision 4 to sec. 549, by the amendment of 1879, as stated in Throop's notes to the Code, page 287, was to have the allegation of fraud made in the complaint instead of in an affidavit, and tried as an issue in the

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action by the jury instead of by the court, and thus to change the method of enforcing a remedy, not to take it away (*Hecht v. Levy*, 20 *Hun*, 54). The cause of action for fraud was sufficiently pleaded.

H. F. Averill and *W. T. B. Milliken*, for respondent.—The action is in the nature of an action on the case, with the contract as only one of its facts, and the sufficiency of its pleading is to be determined by demurrer or motion (*Rowe v. Patterson*, 48 *Super. Ct.* 249; *Hecht v. Levy*, 20 *Hun*, 54). Subdivision 4 of section 549 of the Code requires the plaintiff to bring his action on the fraud, if he wishes an order of arrest, and procuring an order of arrest concludes him as to the nature of the action. In order to sustain his action he must allege and prove the fraud as well as the contract. Section 549 defines causes of arrest which are identical with the cause of action, and section 550 states the causes of arrest which are extrinsic to the cause of action, and section 557, which prescribes what proof shall be necessary to procure order of arrest, provides that in cases under section 549 it need only be shown that a cause of action exists as prescribed in that section; while for arrest under 550 proof must be furnished not only of cause of action but also facts extrinsic to cause of action as cause of arrest, and it will not be pretended that proof of the contract merely would support an order of arrest. There is no separation between the cause of action and the cause of arrest. If there had been, the case could easily have been so divided that the facts constituting the cause of action, and those constituting the cause of arrest, might be respectively passed upon by the jury, and so have saved another trial upon the contract alone.

The complaint should therefore allege facts sufficient to constitute a cause of action for deceit, or, in this case, for fraud in incurring the liability sought to be enforced (*Rowe v. Patterson*, 48 *Super. Ct.* 249).

This the complaint fails to do. The allegation of the complaint is "that the defendant was guilty of a fraud in

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contracting and incurring the liability," in that, etc., limiting the general statement—so that it is equivalent not even to a positive general statement, but only to the averment that the facts alleged constitute a fraud, etc.

BY THE COURT.—SEDGWICK, Ch. J.—The complaint began by sufficiently stating a cause of action for goods sold and delivered. It then proceeded, that the defendant was guilty of a fraud in contracting and incurring the liability, in that, in the bargaining for the sale, he did and said certain things. It was not alleged that any of his acts were fraudulently done. It alleged that certain things he represented to exist did not exist, but it was not alleged that any of his representations were fraudulently made, or with knowledge that they were not true, or with intent to defraud the plaintiff. The answer admitted the sale for the price alleged in the complaint, but denied all the other allegations of the complaint.

On the trial, before testimony given, the defendant moved to dismiss the complaint; and the ground was, as I understand, that although the complaint averred that the defendant was guilty of fraud in contracting the indebtedness, no averments were made that facts existed which constituted the fraud, and that in such a case the plaintiff was not entitled to recover upon the sufficient allegations as to the sale and delivery.

I do not think that it is necessary to argue that it was not the intention of the Code to permit judgment in such a case for fraud, upon the general allegation that there was fraud. And it was clear that the complaint did not make sufficient averments as to fraud.

The question that remains is, should the judge have refused to dismiss the complaint, or should he have retained it and given judgment for the breach of contract?

It is evident that the plaintiff did not wish a mere money judgment. The admissions of the answer sufficed to give him that; but when he brought the case on for trial, his

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demand was not only for a judgment of indebtedness on the part of the defendant, but of guilty of the fraud.

The claim is not one consisting of two separable parts, contract and fraud; it is an entire claim, comprehending both. If fraud be sufficiently alleged, but not proven, the plaintiff cannot fall back upon the cause of action on contract; he must go to another action. Where is the substantial difference between the case of untruly stating facts, the non-proving of a part of which prevents judgment for plaintiff, and the case of truly stating all that can be proved, but which, as matter of law, does not constitute fraud? If, in a case like this, a judge should hold that there were sufficient allegations of fraud, there might be judgment for plaintiff under subdivision 4 of section 549 which would entitle the plaintiff to issue execution against defendant's person under section 1487. If this were held to be error, could the plaintiff retain the judgment on the ground that it was sustained by sufficient allegation of indebtedness that had been admitted by answer? It is right to hold the party who begins an action on the position that it is not one where he can obtain judgment only on contract, to that position, until it is ended, although, in one sense, the allegations as to the contract are sufficient; nevertheless, until, by a trial, to the expense and trouble of which he put the defendant, he was forced to abandon the claim so far as the fraud was concerned, he never asserted that the action was on contract pure and simple.

I therefore think that the judgment should be affirmed, with costs.

TRUAX and O'GORMAN, JJ., concurred.

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BENJAMIN LAWRENCE, ET AL., RESPONDENTS, v.
CHARLES FOXWELL, APPELLANT.

Order of arrest under sub. 4, § 549, Code Civ. Pro.—when must be vacated

In case the affidavit on which an order of arrest is granted shows that the action is on contract where the defendant has been guilty of a fraud in contracting (Code, § 549, sub. 4), and it does not appear therein that plaintiff has waived the contract, and elected to proceed for the fraud alone, in the absence of any allegation therein, showing that the complaint alleged that the defendant was guilty of a fraud in incurring the liability, no complaint having been presented upon the motion, the order of arrest must be vacated.

Before SEDGWICK, Ch. J., O'GORMAN AND INGRAHAM, JJ.

Decided June 2, 1883.

Appeal by defendant from order denying defendant's motion to vacate order of arrest.

The facts appear in the opinion.

H. F. Averill and *W. T. B. Millikin*, for appellant.

Ellis S. Yates, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—The motion below was made upon the papers on which the order of arrest was granted. I am of opinion that the motion should have been granted.

The affidavit on which the order of arrest was made averred that a summons had been issued for service; that a sufficient cause of action existed, "arising out of the following facts;" that defendant bought certain goods for a certain price, and made certain statements in the course of the purchase; "and that by reason of the foregoing facts this deponent alleges that the defendant has been guilty of a fraud in contracting the debt hereinbefore set forth; and that at the time he purchased said merchandize from deponent he did not intend to pay for the same, but intended to, and did, convert the same into money for his own use." The inference from these allegations is, that the action was upon contract, where the defendant had been

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guilty of fraud in contracting. There was in no part of the affidavit any allegation that the plaintiff elected to rescind the contract, and bring the action solely for damages from the fraud.

The right to the order depended, then, upon its being valid under the terms of subdivision 4 of section 549 of the Code of Civil Procedure. That subdivision gives as a condition of a right to arrest in an action on contract "that it is alleged in the complaint that the defendant was guilty of a fraud in contracting the liability." There was no complaint presented with the motion for the arrest, nor did the affidavit aver what the allegations of the complaint were. The provision of section 558, that implies that in certain cases the complaint need not accompany the order of arrest, does not apply to such a case as this, because the section is made subject to the provisions of section 557, which clearly directs that the affidavit must show that the conditions of subdivision 4 of section 549 exist.

The order appealed from should be reversed, with \$10 costs, and an order entered vacating the order of arrest, without costs.

O'GORMAN and INGRAHAM, JJ., concurred.

JOHN H. PLATT, AS ASSIGNEE, &CO., RESPONDENT, v.
EDWARD R. JONES, APPELLANT.

*New York Stock Exchange—right of membership—rights of assignee in
bankruptcy therein.—Equity.—Injunction.*

Defendant held, in his own name, as part of the assets of a firm of which he was a member, a seat in the New York Stock Exchange, a voluntary unincorporated association, which seat was by the by-laws unassignable without the consent of two-thirds of the committee on admissions of said association, it being also provided therein that all unpaid dues of membership and claims of other members should be a lien on said seat. [Said firm made an assignment in bankruptcy of all its assets, and the defendant continued thereafter to hold and use said seat for his own benefit. The assignee, after demanding the said seat of defendant, which was

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refused, brought this action to enjoin him from using or interfering with it, and to compel defendant to do all such acts, and execute all such instruments, as might be specified by plaintiff, to the end that said seat might be disposed of, and the proceeds applied to the trust, etc. The association was not made a party to the action, and it did not appear that plaintiff had made any contract of sale with a third party, and that defendant or the Stock Exchange had refused to perform any acts necessary to transfer or confirm the title to said seat; nor was it claimed that, except as above, defendant had been guilty of any interference with plaintiff's rights.

Held, that no equitable cause of action was shown; that defendant had done nothing which impaired the property rights of plaintiff or prevented him from disposing of whatever rights he had; that no one could become a transferee of said seat under these existing circumstances; and the Stock Exchange not being a party, it will not be assumed that it will refuse its assent to a transfer for the benefit of the assigned estate in a proper case.

Further held, that the right of membership in said association was incorporeal, and the fact that defendant continued to use it did not affect the value of the property claimed by plaintiff, or prevent him from receiving any profits to which he was entitled; also, that there was no possibility that the non-payment of dues or any other lien caused by defendant, could affect plaintiff's rights.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided, June 2, 1883.

Appeal by defendant from judgment entered on decision of judge.

The facts appear in the opinion.

Man & Parsons, for appellant.

Chambers, Boughton & Prentiss, for respondent.—By the assignment (§ 5044, *U. S. R. S.*) all the property of the defendant vested in plaintiff (*Comegys v. Vasse*, 1 *Pet.* 193; *French v. Carr*, 7 *Ill.* 664; *Kinsee v. Winston*, 4 *Br. R.* 21). Defendant's membership in the Stock Exchange and right to the "proceeds" thereof was property within the above section and decisions, and passed by the assignment to plaintiff (*Re Ketcham*, 1 *Fed. Rep.* 840; *U. S. Cir. Ct.*; *Hyde v. Woods*, 4 *Otto*, 523; *Gallagher v. Lane*, 19 *Bankr. R.* 224; *Grocers' Bank v. Murphy*, 60 *How.* 426; *Ritterband v. Baggett*, 4 *Abb. N. C.* 67; *Powell*

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v. Waldron, 89 N. Y. 331-2; Sewall v. Ives, 61 How. 54). It is not merely a "personal privilege," but the constitution itself makes the membership and its "proceeds" property as regards the Exchange, and as to its members, and also as to the legal representatives of deceased members, and to voluntary transferees of members,—why, then, is it not also property as to creditors of members?

The mere fact that the property in the seat and its proceeds is vested in the plaintiff, and that defendant is using it without plaintiff's consent, is sufficient ground for the injunction. Moreover, defendant may incumber it with claims on contracts with other members of the Exchange, or with dues to the Exchange itself; also, plaintiff must secure an actual vacancy in the Exchange before he or any transferee from him can apply for election.

The assignment in bankruptcy not having been sufficient under the rules of the Stock Exchange, the defendant should be required to make such further act of assignment as is required by those rules to put the property in plaintiff's possession. As it is impossible for plaintiff to predetermine who will be accepted by the Exchange as transferee of the seat, or what form of transfer will be required, the decree is correct in its present general form (*Re Ketchum, supra*; *Grocers' Bank v. Murphy, supra*; *Ritterband v. Baggett, supra*).

The decree herein merely disposes of defendant's seat or membership as defendant himself should voluntarily have disposed of it, by declaring it vacant in law and making it vacant in fact; thus putting plaintiff in position to request the Stock Exchange to fill the vacancy and dispose of the seat as provided by their own constitution when a vacancy occurs.

BY THE COURT.—SEDGWICK, Ch. J.—It is unnecessary to state the pleadings. The court found, as facts, that the plaintiff had been made assignee in bankruptcy of a firm composed of the defendant and one Davidson; that part of the assets of the firm, when they became bankrupt, "was

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a seat or membership in the association, in the city of New York, known as the New York Stock Exchange," which had been purchased in the name of the defendant; that at the time of such purchase the defendant "became a member of said association, and entitled to the rights of membership, and sat in said association; which seat and rights of membership defendant took, and has ever since continued to hold, in his individual name;" that said seat or membership is of the value of \$30,000; that plaintiff has demanded of defendant said seat or membership, and all right and title therein; but said defendant refused, and still neglects and refuses, to comply with said demand, but has at all times since the filing of the petition in bankruptcy held, possessed and enjoyed, and still continues to hold, possess, and enjoy, the same; that by the constitution and by-laws of said Stock Exchange all dues of a member thereof to the said Exchange are a prior lien upon the seat or membership of such member, and the proceeds thereof; and such proceeds are also made liable for satisfying the claims of the other members of said Exchange before the balance can be paid to the legal representatives of such member; that by reason of such holding and possession by defendant, there is danger of his incumbering said seat or membership, under the constitution and by-laws of said Exchange, as aforesaid, or that claims for liens or incumbrances thereupon may arise.

The court further found that in and by the constitution and by-laws aforesaid, said seat or membership is transferable, and the defendant, as such member, has the right to transfer his membership under the provisions of said constitution and by-laws. The court did not find what were the conditions of the transferability referred to. The articles in evidence show that a limitation of the transferability was, that the transferee must be approved by two-thirds of the committee on admissions.

The findings of law were, that by the assignment to the plaintiff as assignee in bankruptcy all the property, right, title and interest of said defendant and his firm "in and to

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said seat or membership in the New York Stock Exchange, and the proceeds thereof, passed to, and became and now are, vested in the plaintiff as such assignee,' and that the same are property; that any and all use and occupancy and enjoyment of said seat or membership, and the rights and privileges thereunder, by defendant, are in contravention of plaintiff's rights as such assignee; that defendant should be directed and required to do every such act, matter and thing, as shall be lawful and necessary on his part to put plaintiff in such possession and control of said seat or membership, and the rights and privileges thereunder, that the same may be disposed of, and the proceeds thereof realized by, for, or on account of, said plaintiff; that plaintiff is entitled to judgment that all the right and interest of the defendant in and to the said seat or membership, and the proceeds thereof, are vested in plaintiff as assignee; that defendant be enjoined from using, occupying or enjoying, or in any manner interfering with, said seat or membership, or the rights and privileges thereunder, or the proceeds thereof; and that said defendant, upon the request of plaintiff, forthwith execute such instrument or instruments, and do and perform such act or acts of surrender, assignment or transfer, to plaintiff, or to such person as shall be specified by plaintiff, as shall be necessary to be done, performed or executed on the part of the defendant, to the end that said seat or membership may be disposed of, and the proceeds thereof realized by, for, or on account of, said plaintiff, as assignee as aforesaid.

. The association was not made a party defendant. Necessarily, it must participate in any proceeding which would transfer the membership to a third party. No one, under existing circumstances, could become a transferee of the right of membership, under the by-laws; and the testimony does not show that the defendant could do anything to alter these circumstances. For instance, that a contract had been made by plaintiff with a third party conditionally, and the defendant refused to nominate him to the Stock Exchange. The defendant had done no act which impaired the property

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rights of plaintiff. He had done nothing, and probably could do nothing, which could interfere with the plaintiff selling such right as the plaintiff has. Therefore no equitable cause of action was shown. To make such a cause of action, it is necessary to show that the plaintiff is possessed of some right which the defendant interferes with, or that the defendant is bound in equity to do something to perfect plaintiff's legal title or to enable him to take possession of his right.

In advance of the actual or threatened interference, or in advance of the plaintiff's being able to enjoy the right, the defendant should not be called upon in a litigation to take part in what is but an argument as to what will be the rights of a plaintiff in a contingency that may never occur. The general rule is, that equity does not entertain questions that do not pertain to definite and existing obligations of defendants; or, in a common form, that the plaintiff must have a definite and complete right against the defendant (*O'Rielly v. Mutual Life Ins. Co.*, 2 *Abb. N. S.* 170; *Haynes v. American Popular Life Ins. Co.*, 36 *Super. Ct.* 214, which applies this principle as to part of a relief demanded, while it follows *Cohen v. N. Y. Mutual Life Ins. Co.*, 50 *N. Y.* 624, which recognizes the general principle).

It would occupy too much time to state the difference in the views of the plaintiff and of the defendant, as to the nature of the right acquired by the plaintiff, under the assignment in bankruptcy. In some respects, it would appear that the defendant was certainly right. For instance, he denies that privileges personal to him as a member have ever passed to the assignee. The assignee can never be a member. But, whatever view the defendant has taken or announced, it can never interfere with the enjoyment of plaintiff of the right he has.

It is not a benefit to the plaintiff that he should have judgment, that in the future the defendant must execute such instrument as the plaintiff shall specify, to the end that the membership may be sold, and the proceeds thereof realized. Such may be his duty hereafter; if it be, he will

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be held to its performance when the question of performance arises. Until then, the defendant should not be called to litigate as to present views in their relation to future emergencies. He had a right to take all the time to consider what his views should be. His views being erroneous now, can hardly give a cause of action.

Nor was the plaintiff injured by what the defendant actually did, so far as that is embodied in the findings "that the defendant took, and has ever since continued to hold in his individual name, the said rights of membership and seat in said association," and "that any and all use, occupancy and enjoyment of said seat or membership, and the rights and privileges thereunder, by defendant, are in contravention of plaintiff's rights as such assignee."

The term "seat" implies more of corporeal property than the facts justify. The word is not used in the constitution or by-laws of the Stock Exchange. The right of a membership is incorporeal. The defendant has gone into the Exchange, and used it for buying and selling. There are many other members. The fact that he has thus acted does not, from any inference on the testimony, affect the title or value of the property claimed by the plaintiff. He makes one more broker than there should be, according to the plaintiff's interpretation of the constitution; but he collects no fees nor enjoys anything which would go to the plaintiff. It is probably true that he is allowed to do what he does on the assumption and assertion, by himself and the officers of the Stock Exchange, that the assignment in bankruptcy did not so entirely divest him of the original rights of membership that upon his discharge in bankruptcy he had not lawful right to use his former privileges. If he were to continue to act as a broker after the Stock Exchange had permitted the plaintiff to transfer to a third person, the plaintiff would enjoy all the right he claims. The Exchange not being a party, it is not to be assumed that they will not do what by law they are required to do. Their present assertion or assumption, as to the defendant's right, or want of right, does not show that in

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the future they will not, upon proper request, perform every duty to the plaintiff.

There is not any possibility that the non-payment of dues by the defendant will disturb plaintiff's right. No lien can charge the plaintiff's right which the plaintiff himself has not given or caused.

I am of opinion that, generally, the judgment is a declaration of defendant's obligation as to contingencies which have not arisen. It is not intended to intimate that the plaintiff may not have a cause of action in the future against the defendant and the Stock Exchange, if certain things are done.

Judgment reversed and new trial ordered, with costs to abide event.

TRUAX and INGRAHAM, JJ., concurred.

CHRISTOPHER COURTNEY, APPELLANT, v. JOHN B.
CORNELL, ET AL., RESPONDENTS.

*Negligence.—Defective rigging of derrick.—Responsibility of master to servant.—
Negligence of fellow-workman*

The plaintiff, while engaged as a servant of defendants, in operating a derrick used by them in the construction of a certain building, received severe injuries, resulting from the slipping of the derrick from its place while in use. The accident was caused by the stretching of the guy ropes, which held the derrick in place, from rain which fell the night before the morning of the accident, it having been in use for some time—and there was evidence that the accident might have been prevented by proper precautions. It was entrusted to defendants' foreman to construct and rig the derrick, and on the morning in question he superintended the starting of said derrick, immediately prior to the happening of the accident. The complaint was dismissed at the trial.

Held, error; that it was the continuous duty of defendants to furnish to their employees a properly rigged derrick, and to maintain it in such condition; and that the negligence of the foreman in that regard was defendants' negligence, and not that of a fellow-servant of plaintiff.

SEDGWICK, Ch. J., dissenting, *held*, that in entering upon his employment, plaintiff accepted the risk involved in changing the derrick from time

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to time, and could not rely upon defendants' undertaking to arrange it upon each occasion of its use.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided June 2, 1883.

Appeal from a judgment dismissing the plaintiff's complaint, and from an order denying a motion for a new trial on the judge's minutes.

The facts appear in the opinion.

C. D. Rust, for appellant.

Tallmadge W. Foster, for respondents.

O'GORMAN, J.—This is an action to recover damages for injuries claimed to have been inflicted on plaintiff by reason of the negligence, incompetence and unskillfulness of the defendants, in failing to properly place, fasten and guard a derrick used by defendants in raising an iron column to the fourth floor of a building in process of erection at the corner of Franklin street and Broadway, on October 25, 1881. The defense is, that the accident was either unavoidable, or, if the result of negligence, that it was the negligence of a co-servant of the plaintiff, and which is one of the ordinary risks which plaintiff assumed. The accident occurred between seven and eight in the morning. The derrick was on the fourth floor. Marsh was the defendants' foreman. He had the power to employ and dismiss workmen for the defendants, and the constructing and rigging of the derrick was under the charge and direction of Marsh. The defendants were in the habit of going to the building every morning between nine and ten o'clock—sometimes eleven o'clock—and remaining there ten or fifteen minutes, sometimes less. Marsh directed the rigging of the derrick that morning, and the manner in which the work was done was left to Marsh, and plaintiff had nothing to do with the rigging of it. There was no roof to the building, and it had been wet the day before, and had rained during the night. The derrick was not rigged that morning, but had been rigged some days before. It was standing there ready

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rigged. The effect of rain on ropes is to cause them at first to shrink, and then, when weight is put upon them, to stretch. From the fact of its having rained before, these guy ropes would stretch considerably; and of this fact the foreman was aware. The plaintiff and other workmen were set to work at the windlass of the derrick by the foreman in order to raise an iron column weighing about 3,000 pounds; and they had raised it about four feet clear from the sidewalk when the feet of the derrick kicked back at its base; it slipped off the skids or planks on which it rested, then it broke the plank on which plaintiff stood, and he was thrown from the fourth to the second floor, his legs broken, and he received severe injuries. Marsh, the foreman, had been on the floor where the derrick was, to see if all was right. As soon as he noticed that it was perpendicular, and before it was raised from the sidewalk, he ceased to look at it, and went down stairs. After the hoisting of the column had begun, the foreman sent plaintiff on a message, which occupied him about five minutes. When he returned, the foreman put plaintiff again to work at the handle of the derrick. The derrick rested on two planks called skids. The skids rested on timbers, which timbers rested on iron beams. The skids were not braced or tied to the timbers, and the derrick retained its position by guys and its own weight.

An expert in the use of derricks and in putting up iron house fronts, examined on the part of the plaintiff, gave it as his opinion that the slipping of the derrick off the skids was caused by the fact that the legs were not hitched and the derrick was leaning too much; that it should have been lashed to the iron beams, or whatever there was to lash it to; that after a rainy day, in order to avoid accidents arising from stretching of ropes at night, it is usual to test the ropes by raising the column off the ground, watching it to see what the rope gives, and then straightening the derrick up again.

The manner in which the derrick was rigged, and the way in which the column was hoisted, was not the proper

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course to have pursued under the circumstances. In fact, the derrick was not lashed to the iron beams, and the foreman, having charge of the rigging of the derrick did not test the ropes by raising the column a few feet from the ground, and then readjusting the ropes, but ceased to watch it before it had been raised from the sidewalk. The end of the column was on the walk when he left.

The defendants moved to dismiss the complaint, on the ground that the plaintiff had failed to prove his cause of action, because no negligence on the part of the defendants had been proved, and because the negligence, if any, was the negligence of a co-servant. The motion was granted by the court, and the question now is, whether the case should not have been sent to the jury.

As far as the safe construction of the derrick was concerned, the foreman, Marsh, did not occupy towards the defendant the position of foreman. The duty of providing for the workmen a safe derrick, as far as reasonable care and precaution could affect that result, and also the duty of maintaining the derrick in a safe condition, rested on the defendants; and the person to whom, in their absence, they delegated that duty was, "*pro hac vice*," the agent and representative of the defendants, and for his negligence, if any, therein, the defendants were liable (*Fuller v. Jewett*, 80 N. Y. 53; *Crispin v. Babbit*, 81 *Ib.* 516).

The principles of the law on this subject have been stated with great clearness and precision by the learned Chief Judge of this court, in the case of *Green v. Banta*, decided at general term in June, 1882 (48 *Super. Ct.* 156).

The question in the case at bar is, whether the defendants having, for all that appears, supplied for their servants a safe derrick, were bound also to see that it was safely rigged, and to take reasonable precautions lest the changes of the weather, by tightening or stretching the ropes, should affect its position or rigging, so as to make it insecure and liable to injure the servants. It may well be argued that a derrick, such as was used in this case, in order to be an efficient machine for any purpose, requires to be attached

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and fixed firmly and steadily to its base ; and that the fixing of it from time to time, or, as it is called, "rigging it," is a necessary element in the integrity and safety of the machinery, and as essential to its being a working machine as is the due strength of the iron or wood of which the derrick is composed; and until so fixed or rigged it is not in fact a machine for any of its ordinary purposes. The rigging of the derrick in this case was under the special charge of the defendant's foreman, who directed and had charge of that duty. It was the duty of the plaintiff and the other men to work the windlass and put the machine in motion, and hoist weights by means of the derrick. With the rigging of it, or with defects or dangers therein, they had no concern, unless to obey the orders of the foreman. That was no part of their business, any more than it would have been to attend to and take precautions against any defect in any other part of the construction of the machine.

There seems to be no material difference between a defect or unsafety of the derrick, arising from the slackening of the ropes, and from the weakening of the windlass or any other part of the iron work. The result of a defect in either case, as far as safety to the employees was concerned, would have been the same.

The machine furnished to the plaintiff for use on the morning in question, and on which he was directed to work, was the derrick as then fixed or rigged, and including, as a necessary part thereof, the ropes as braced to the beams, all together making one machine. Plaintiff was justified in depending on the foreman's seeing that the rigging of the machine was proper and safe, so that no danger need be apprehended from any neglect in that respect. Where the master places the entire charge of his business in the hands of an agent, the neglect of the agent in failing to supply and to maintain suitable instrumentalities for the work is a breach of duty for which the master is liable. These were master's duties (*Crispin v. Babbit*, 81 *N. Y.* 521, *et seq.*). If there were any negligence

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on the part of Marsh, the foreman, as to the rigging of the derrick on the morning in question, arising from the stretching of the ropes caused by the rain of the previous day and night, and that negligence caused the injury to the plaintiff, the defendants were liable therefor. And whether the foraman was or was not negligent therein was, in my judgment, a question of fact for the jury.

The question whether the plaintiff's own negligence contributed to the accident, as a proximate cause of it does not seem to have been relied on by the learned counsel for the defendants, or to have been dwelt on by the court in dismissing the complaint. It was open to argument, from the evidence, that plaintiff himself, having been for many years in the business of hoisting heavy weights by the aid of derricks, should have known the necessity of shifting the ropes so as to make allowance for stretching of them caused by rain, and that his own negligence contributed to the accident. But that also was a question for the jury.

The judgment should be reversed, with costs to abide the event, and a new trial ordered.

INGRAHAM, J.—There are two well defined exceptions to the rule that the master is not responsible to one servant for an injury occasioned by the negligence of a co-servant of the common employer. First. Where the servant whose negligence caused the injury was an unfit and incompetent person to be intrusted with the duty to which he was assigned, and the accident resulted from his incompetency or unfitness. Second. Where the accident resulted from unsafe and imperfect machinery and appliances furnished for the use of the servant in the master's business (*Murphy v. B. & A. R. R. Co.*, 88 *N. Y.* 150).

The master's liability, if sustained in this case, must be upon the second exception above noticed.

It was the duty of the defendants to furnish the plaintiff with safe and proper machinery and appliances for the business for which he was employed ; and if there was any negligence on his part, or on the part of any person intrusted

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by him with the business of employing servants and providing safe machinery and appliances, he was liable.

Marsh was the foreman on the work. He employed the plaintiff originally on another piece of work ; and when that was finished, plaintiff continued in the employ of defendants. Marsh engaged other men who worked there. He testified : " I had charge of the work." " I had charge of constructing the derricks," and had filled that position for about nine years. " The manner in which the work was done was left to me." " I directed the original rigging of the derrick in question." " I also directed the rigging of derrick on the morning in question." " I set them to work that morning." He further testified that he looked to see if it was all right, and then gave the word to commence.

I think it must be conceded that there was sufficient evidence to sustain a finding that Marsh was not a fellow-workman, but was a person placed by defendants in charge of the building, and that for his negligence his employer was responsible.

The next question is, was the proper rigging of the derrick a duty which the master owes to his servants ?

Marsh, the foreman, swears, that he had charge of construction of the derrick ; directed the original rigging of the derrick ; and also directed the rigging on the morning in question, before the men commenced work on it, and he looked to see that it was all right, and then gave the word to commence. That he then took plaintiff off the handle and sent him to find some tools ; then called him back, and put him (plaintiff) on the handle. Plaintiff testified that he commenced working that day by direction of Marsh, the foreman, and that he had nothing to do with rigging the derrick that day.

In *Green v. Banta* (48 *Super. Ct.* 156) the general term of this court held, that it was the duty of the defendants to furnish a workman, a properly built scaffolding ; and, to perform that duty he employed a foreman, that any negligence of the foreman in putting together the scaffold would be negligence of the defendant and not of a fellow-workman.

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I cannot see the distinction between that case and the case at bar. If it was the duty of the employer in *Green v. Banta* to furnish a properly built scaffold, it must have been the duty of the defendant to furnish a properly rigged derrick ; and a foreman having been employed to properly rig the derrick (as he himself testified he was), his negligence in so doing would be negligence of the defendants (*Fuller v. Jewett*, 80 *N. Y.* 53).

There is evidence tending to show that the accident was caused by the improper and negligent rigging of the derrick, and I think there was sufficient to justify the submission of the questions to the jury.

The case of *Crispin v. Babbitt* (81 *N. Y.* 521), relied on by the respondent, is direct authority for the liability of the defendants for the acts of the foreman under the circumstances in this case. The court says, on page 521 : "However low the grade or rank of the employee, the master is liable for injuries caused by him to another servant if they result from the omission of some duty of the master which he has confided to such inferior employee." In this case Marsh swears that it was his duty to rig the derrick ; that he attempted to perform that duty on the morning in question ; and there is evidence tending to show that in consequence of a negligent performance of that duty the plaintiff was injured.

For these reasons I concur with Judge O'GORMAN that the judgment should be reversed, and a new trial ordered, with costs to abide the event.

SEDGWICK, Ch. J.—[Dissenting.]—I am of opinion that the plaintiff, in entering upon his employment, accepted the risk that would be involved in arranging the derrick and its several attachments, from occasion to occasion, to prepare it for lifting the columns. The necessities of the operation would lead to frequent changes of the derrick from place to place. The plaintiff could not have supposed that he had a right to rely upon the defendant's undertaking that they would arrange the derrick safely on each occasion

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of its use. He must have perceived that the management of the derrick would be committed by the defendants to a subordinate. As there was no testimony that defendants were negligent in their selecting this subordinate, my opinion is that the judgment should be affirmed.

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PELLANT, v. HENRY E. ABBEY, ET AL.,
RESPONDENTS.

Stipulations—power of court in regard to.—Attorney and client.

The court at special term has general power to relieve in a proper case a client from stipulations entered into by his attorney, *e. g.*, a stipulation that the verdict of a jury, or order on direction of the court, in a certain other action between the same parties, shall be deemed to have been made in the action in which the stipulation is entered into—or, that in case a default in a certain other action between the same parties is not opened, judgment shall be entered in the action in which the stipulation is made against the party stipulating.

Whether an attorney can bind the client by such stipulations without his express assent or authority, *quære*.

Before SEDGWICK, Ch. J., and TRUAX and INGRAHAM, JJ.

Decided June 2, 1883.

Appeal from order of the special term relieving the defendants from stipulations entered into by their former attorneys.

The stipulation in action No. 3 was to the effect that the verdict of the jury, or direction or order of the court, in certain other actions between the same parties should be taken and considered as having been rendered and made in this action. The exact terms of the stipulation in action No. 4 were not stated, but it appeared to have been to the effect that if the default in actions Nos. 1 and 2 should not be opened, the plaintiffs should enter judgment for the amount demanded in the complaint in said action No. 4.

Davenport & Leeds, for appellant.

Geo. L. Rives and *A. J. Dittenhoefer*, for respondents.

Opinion of the Court, by INGRAHAM, J.

BY THE COURT.—INGRAHAM, J.—It is well settled that the court at special term had power to relieve the defendants from the stipulation entered into by their attorneys (*Barry v. Mutual Life Ins. Co.*, 53 *N. Y.* 536). At the time the stipulations in action No. 3 was signed defendant's attorney was in Europe, and both defendants swear that the stipulation had been entered into without their authority, and that they had no knowledge that either of them had been made until about the trial of the applications to the special term for relief.

I think that under the decision cited by the court, in granting the order appealed from, there is considerable doubt whether an attorney has authority to make such stipulations as were made in these cases without the express assent of his client. It was undoubtedly within the power of the court to grant or refuse a favor on condition of making such stipulation; and an acceptance of such a favor would bind the party so accepting it with the terms or conditions on which it was granted; but it does not appear that the stipulations in question were executed under such a direction, but were simply made in pursuance of an agreement between the attorneys for their respective parties.

Without passing on that question, and without passing on the validity of the defenses set up in the amended answer, I think that this was a proper case for the court to relieve the defendants from the stipulations. The original actions were never tried, but judgments were taken by default; the defendants have had no opportunity to try the questions in the regular way, at the regular trial terms; and I think, under the circumstances of these causes, they should have such opportunity. If plaintiffs are entitled to recover, it does not appear that they will be prejudiced by the order appealed from. That provides for security for the payment of any judgment that they may obtain, and the payment to them of the costs of the actions.

I am of the opinion that under all the circumstances of

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these cases the order appealed from should be affirmed without costs.

SEDGWICK, Ch. J., and TRUAX, J., concurred.

ELLEN C. VOSPER, AS ADM'RX, &c., RESPONDENT, v.
THE MAYOR, &c. OF NEW YORK, APPELLANTS.

Municipal corporations.—Negligence.—Highways.—Trial.—Argument of counsel.

In an action to recover damages for injuries caused by the negligence of defendants, which injuries were occasioned by the falling of a tree growing on the sidewalk in a public street, and which after its fall was found to be rotten from its roots up, to a dangerous degree, the evidence being conflicting as to whether there was any exterior sign thereof while the tree was standing,

Held, that the obligations of the city cannot be limited to the duty to act only upon exterior signs of danger, and it is a question for the jury whether or not the defendants should by some means anticipate the danger, even by cutting down the tree.

It is error to permit counsel, against objection, to read, during his summing up, extracts from a book of reports of law cases. But where it is clear that the opposite party was in no way injured, *e. g.*, where none of the facts of the case cited were given by the counsel to the jury, and the matter read contained only the principle of law which the court thereafter properly charged, such error will not be fatal.

Before SEDGWICK, Ch. J., and INGRAHAM, J.

Decided June 2, 1883.

Appeal by defendant from judgment for plaintiff entered in a verdict of jury, and from order denying a motion for new trial made upon the minutes of the judge.

George P. Andrews, corporation counsel, and *Charles B. Candy*, for appellants.—The following appears in the appeal book: "Mr. A. G. Vanderpoel summed up for the plaintiff, and in the course of his remarks commenced to read from the *New York Weekly Digest* of February 2, 1883, the case of *Brusso v. City of Buffalo* (16 *W. Dig.* 1). Defend-

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ants' counsel objected to his reading this, as incompetent and improper. The court: Counsel may proceed with his argument. Defendants' counsel excepts. Mr. Vanderpoel then continued to read: 'In that case it was held that the city was under an absolute duty to keep its streets in a safe condition for public travel, and was bound to exercise reasonable diligence and care to accomplish that end.' " The objection is in proper form (*Lyons v. Erie R. R. Co.*, 57 *N. Y.* 492).

The objection thus made was a proper one, and the court ought not to have permitted plaintiff's counsel to have read from the volume in question, whether it was from an authenticated legal publication or not; and, it made no difference that it was used by counsel as a part of his argument; that was the only office of counsel at that stage of the trial, and the plaintiff had no right to read law to the jury, from that or any other particular case (*Tuller v. Talbot*, 23 *Ill.* 357; *Sprague v. Craig*, 51 *Id.* 288, 294; *People v. Anderson*, 44 *Cal.* 65; *Yoe v. People*, 49 *Ill.* 410; *Koelges v. Guardian Life Ins. Co.*, 57 *N. Y.* 638; *Gould v. Moore*, 40 *Super. Ct.* 387; *Mitchum v. State of Georgia*, 11 *Ga.* 615; *Tucker v. Henniker*, 41 *N. H.* 317, 322-326; *Hoxie v. Home Ins. Co.*, 33 *Conn.* 47; *Shepherd v. Thompson*, 4 *N. H.* 213; *Loyd v. Hannibal & St. Jo. R. R. Co.*, 53 *Miss.* 509; *Martin v. Orndorff*, 22 *Iowa*, 504; *Commonwealth v. Murphy*, 10 *Gray* [Mass.] 1; *Griffin v. Bartlett* [N. H.], 19 *Alb. L. J.* 98; *Niel v. Abel*, 24 *Wend.* 185).

The courts have sometimes permitted counsel to read from legal text-books. Thus, in *Harvey v. State* (4 *Ind.* 516), it was held, a proper charge having been given with regard to it, no error to have read *Wharton's Medical Jurisprudence* to the jury. Text-books in general, however, cannot be so read unless first introduced in evidence, and proved by a competent witness to be an authority (*Yoe v. People*, 49 *Ill.* 410, 412; *Holman v. Click*, 16 *Alb. L. J.* 136). But there is a wide and obvious difference between a paragraph in a text-book which states general principles, and a reported decision which relates to a

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specific case; and the defendants entertain no doubt that their exception hereinabove discussed is well taken (See *Reich v. Mayor* (*Com. Pl., G. T.*, March 15, 1883; opinion by BEACH, J., concurred in by DALY, Ch. J., and VAN BRUNT, J.; 17 *Week. Dig.* 140).

Defendants' requests to charge as to the responsibility of the city should have been granted (*Smith v. Mayor*, 15 *W. D.* 103; *Dillon*, § 1006, and cases there cited; *Griffin v. N. Y.*, 9 *N. Y.* 459; *Battersby v. Mayor, &c.*, 7 *Daly*, 16; *Blakeley v. Troy*, 18 *Hun*, 167; *Reinhard v. Mayor*, 2 *Daly*, 243; *Weston v. N. Y. Elevated R.*, 73 *N. Y.* 595; *Gorham v. Trustees of Cooperstown*, 59 *Id.* 660; *McMahon v. Second Ave. R. R. Co.*, 75 *Id.* 231-236; *Parker v. Cahoes*, 17 *Hun*, 531; affirmed, 74 *N. Y.* 610; *Hume v. Mayor, &c.*, 74 *Id.* 264; *Loftus v. Union Ferry Co.*, 84 *Id.* 455).

Aaron J. Vanderpoel, for respondent.—The city has sole power to remove, or permit the removal, of obstructions on sidewalk (*Charter* 1873, ch. 335, art. II., § 82; 1 *Laws N. Y. City*, 88; *Laws* 1866, ch. 74, § 12; 1 *Laws N. Y. City*, 428).

It is required to exercise this power as an absolute duty, and remove all obstructions on sidewalk detrimental to the public or dangerous to life or health (*Diveny v. City of Elmira*, 51 *N. Y.* 506; *Requa v. City of Rochester*, 45 *Id.* 129; *Davenport v. Ruckman*, 37 *Id.* 568; *Conrad v. Trustees of Ithica*, 16 *Id.* 158).

In removing obstructions it acts ministerially, and not judicially (*Hines v. City of Leckport*, 50 *N. Y.* 236; *Requa v. City of Rochester*, 45 *Id.* 129; *Barton v. City of Syracuse*, 36 *Id.* 54; *Milis & Dean v. City of Brooklyn*, 32 *Id.* 489; *Powell v. Tuttle*, 3 *Id.* 396.)

The city has constructive notice of obstructions by lapse of time during which same might have been seen by its officers and agents (*Hume v. Mayor of N. Y.* 47 *N. Y.* 639; *Requa v. City of Rochester*, 45 *Id.* 129; *Davenport v. Ruckman*, 37 *Id.* 568).

It must remove a tree on street or sidewalk when

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it becomes an obstruction dangerous to life or health (Ward v. Atlantic & P. Tel. Co., 71 *N. Y.* 81 ; City of Brooklyn v. Brooklyn City R. R. Co., 47 *Id.* 475 ; Hume v. Mayor of N. Y., 47 *Id.* 639 ; Requa v. City of Rochester, 45 *Id.* 129 ; Hutson v. The Mayor, 9 *Id.* 163).

The city must respond in damages for negligent acts of omission, as well as negligent acts of commission, on the part of its agents and employees (Conrad v. Trustees of Ithaca, 16 *N. Y.* 158).

The objection of defendants to the reading from a reported case to the jury was properly overruled, because the court had it in its discretion to permit the reading.

PER CURIAM.—The action was for damages for the death of plaintiff's intestate, caused by the negligence of the defendants. The cause of the death was the falling of a tree that had been growing on a sidewalk. After the tree fell it was apparent that it was rotten from the roots up, to a dangerous degree. There was some conflict of evidence as to whether there was any exterior sign of the rottenness when the tree was standing.

On the trial, the defendants' counsel asked the court to charge, which the court declined, that the plaintiff could not recover, unless she satisfied the jury that the rottenness was visible and obvious to view from ordinary observation; that if the tree presented no outward indication of rottenness or unsafeness, then there was no negligence in not boring the tree or not making any extraordinary examination to test its safety unless the city had reason to believe, from notice or otherwise, that it was rotten or unsafe; that to demand of the city that it should bore the tree, or should make any other than a superficial examination to look for possible defects which could not be discovered, would, in the absence of notice of their existence, be imposing upon the city more than ordinary care; that if the decay in the tree, which occasioned the accident, was concealed and hid from ordinary observation, and the city had no notice, actual or constructive, that such tree was

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decayed or dangerous, the city is not guilty of negligence for not discovering such decay, and the accident is one of misfortune, or inevitable accident, for which there is no redress at law; and that if the tree was to all outward appearance reasonably safe and sound for the ordinary season and storms, and if the city had no notice of its unsound character, and no reason to apprehend that it was unsound, then the city is not liable.

It may be well to say that the rottenness or decay referred to in these requests means a rottenness or decay that would make the tree liable to fall or be blown down. There was an assumption in these requests which justified the court in declining to charge them. They assumed that the plaintiff must rely solely upon the duty of the city, as respects an actual condition of rottenness or unsafety. They imply that, as matter of law, the duty began only when the danger began, and that if the city had no reason to believe that the tree had actually become unsafe, it would not be liable. But it was incumbent upon the city to use ordinary caution to anticipate the danger that could come into existence without manifesting itself to ordinary observation. If the contingency of the facts were that a secret cause of danger might grow and increase, and yet be hidden, it could not be assumed that, as matter of law, the city was not bound to do anything except use ordinary means to ascertain when danger was imminent and imperiled the safety of passers-by. It would be a question for the jury as to whether the defendant should do or not do something, even to cutting down the tree, to prevent the danger. The jury could find whether it was the duty of the defendant to ascertain the habits of a tree of this kind, growing in city soil, and to ascertain whether it was likely or unlikely that while the tree was fair on the outside, and apparently staunch, there was reasonable ground for apprehending that it might be, in fact, unsafe. On this point there is the testimony of an expert, a witness for the defendant, who, speaking of the kind of rot that was in this tree, said, "When the rot first commences down in the tap-root, the

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decay goes on, and it is hardly possible to tell whether the tree is sound or not, because it does not appear at the top ; such a tree goes on increasing its diameter, and it rots away as fast in the center as it makes aggregate growth on the outside ; the rot may be in it a long time." Another part of his evidence went to show that such rotting was likely to begin from the kind of soil there is in the city. It would be incorrect to limit the obligation of the city to act only upon what was called in the case the appearance of the tree as being dangerous. The city would be bound to act upon their knowledge, or obligation to gain knowledge, as to the intrinsic qualities of the tree and the soil, although these were not manifested in the outward appearances of the tree.

The charge of the court, as made, included all that was correct in the requests that have been examined.

On the trial, the plaintiff's counsel was allowed to read to the jury, in summing up, from a report of law cases, against the objection of defendant's counsel, the following extract :—" In that case it was held that the city was under an absolute duty to keep its streets in a safe condition for public travel, and was bound to exercise reasonable diligence and care to accomplish that end." The counsel who read this, probably mistook the direction of the judge to proceed with his argument as a permission to read the extract. This is doubtful, however, as the words of the court are stated in the case to be, " Counsel may proceed with his argument." The permission, if it were given, was irregular. Such a proceeding may, in some cases, tend to withdraw the minds of the jury from the issue of fact before them, and from their duty to take the law from the court. In this case, it is clear the defendant could not have been injured. None of the facts of the case cited by the counsel to the jury were given by him, and what he read could only have impressed the jury with what the court afterwards, in substance, charged, that it was the absolute duty of the defendant to use reasonable care in keeping the streets in a safe condition.

Other exceptions were taken. They are not of a kind

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that calls for a detailed statement of them here. They have been examined, and cannot be sustained.

Judgment affirmed with costs, and order appealed from affirmed, with \$10 costs.

JULIETTE G. SCHOENROCK, APPELLANT, v. PETER FARLEY, RESPONDENT.

Pleading—Chattel mortgage may be proven under general denial, as defense in conversion.

In an action for the wrongful conversion and sale of personal property of plaintiff's, where the answer is a general denial, defendant may prove as a defense, the execution of a bill of sale of said property to him by plaintiff, and of an instrument by him agreeing that said bill of sale shall be void on payment of rent, etc., and a sale by him thereunder.

The said instruments make a mortgage and not a pledge, and the defense thereunder denies plaintiff's title, and does not constitute matter of justification.

Before SEDGWICK, Ch. J., and INGRAHAM, J.

Decided June 2, 1883.

Appeal by plaintiff from judgment entered on verdict in favor of defendant, and from order denying motion for new trial made upon judge's minutes.

L. B. Bunnell, for appellant.

Barnum & Rebhan, for respondent.

PER CURIAM.—The complaint charged that the defendant converted to his own use personal property belonging to plaintiff. It appeared in evidence that the property referred to was first taken by defendant about July 2, 1879, and was afterwards sold by him. The allegations of the complaint were so specific that the cause of action was made to rest upon the first taking only; but as the sale was given in evidence, and the trial proceeded as if it affected the issue, it will not be necessary to view the plaintiff's claim as if it were confined to the first taking.

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The chief point on which the plaintiff relies, in the argument for her that there was no defense, is, that the defendant had not justified the taking in the answer, but relied on the general denial. It is further asserted that this put in issue only the title of the plaintiff, and not the right of the defendant, to take the goods under that title. The answer, in fact, did put in issue the title of the plaintiff at the time of the alleged taking.

The defendant proved that before the goods were taken by him, the plaintiff and her husband had made and delivered an instrument that on its face purported to be an absolute bill of sale of the goods to the defendant. Contemporaneously with this, the defendant delivered to the husband an instrument to the effect that if the plaintiff and her husband should pay rent about to become due, the bill of sale should be void. These instruments made a mortgage, and not a pledge. The bill of sale invested the defendant with the title, and gave him the right to take possession immediately (*Hall v. Sampson*, 35 *N. Y.* 277). The defense thereupon went to the title, and did not rest upon a justification which admitted the title in the plaintiff.

The jury determined, under proper instructions, that the plaintiff executed the bill of sale when her husband signed her name at her request. It was claimed that, in some way, she was not bound by the mortgage, because she did not owe the rent or promise to pay it. It is enough to sustain the mortgage, that she had legal power over her own property, and could transfer it unconditionally or conditionally, to be used as security for the payment of her husband's debt.

On the trial, no contest was made by the plaintiff as to the manner in which the goods were sold and the mortgage foreclosed. Other points were made on the trial. They have been examined, but the exceptions connected with them are untenable.

Judgment affirmed with costs, and the order appealed from affirmed, with \$10 costs.

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ANDREW H. H. DAWSON, RESPONDENT, v. GEORGE SLOAN, APPELLANT.

On an action to recover damages suffered by plaintiff in falling down the well of an elevator provided by defendant for the use of his tenants, of whom plaintiff was one, it appeared that plaintiff walked from the street door towards the elevator, and saw that the elevator door was open, as he had often before seen it, and that the boy who ran it was seated beside the elevator; that it was so dark that plaintiff could not see the boy's face, though plaintiff saw he was in a nodding position; that plaintiff, supposing the platform to be there, stepped inside, and fell to the bottom.

Held, that the question of plaintiff's negligence was properly left to the jury; that it was for them to decide whether or not the acts of the boy, defendant's agent, were not such as to throw defendant off his guard; that the plaintiff was bound to make only such effort to ascertain the condition of the elevator as would be made by ordinary prudence, or the ordinary use of the senses by a prudent man.

Also *Held*, that the city ordinance relating to the protection of elevators, etc., was admissible as a fact, upon which, with the others, it might be determined whether defendant was negligent in leaving the door in question open.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided June 2, 1883.

Appeal by defendant from judgment entered on verdict by jury.

The action was for damages for personal injury caused by defendant's negligence.

The facts and exceptions appear in the opinion.

Moses B. Maclay and *Anthony R. Dyett*, for appellant.

A. H. H. Dawson, *Luther R. Marsh*, and *Ira Shafer*, for respondent.

PER CURIAM.—The injury occurred from the plaintiff stepping into and falling down the well of an elevator, when the elevator carriage was at an upper story. The elevator had been made for the defendant, who had provided it for the use of his tenants of the building, of whom plaintiff was one. The elevator faced the street, and was a short distance

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from the street door. The plaintiff walked from the street, through the door, towards the elevator. He saw that the elevator door was open, as he had seen it often before, and that the boy who ran the elevator was sitting by the elevator. There was no gas burning at the place. It was so dark that the plaintiff could not see the boy's face, although he perceived him to be in a nodding position. The plaintiff supposing the platform to be there, stepped inside, and fell to the bottom.

The counsel for appellant argues on these facts, that the judge should not have submitted to the jury to find whether the plaintiff was negligent, but should have held that as matter of law the plaintiff had not shown that he was free from contributory negligence. It is claimed that under the circumstances it was apparent that there was danger, and the plaintiff should have taken precaution, such as feeling whether the carriage was there, or waking the boy to ask him as to that fact, or getting in some other way information upon which he could safely proceed. The position is not valid. It was a question for the jury whether the acts of the boy, defendant's agent, were not such that the plaintiff was thrown off his guard as to there being any danger which called for caution. The jury was the proper judge of whether the defendant was or was not responsible for the announcement to the plaintiff that the elevator was in a condition fit for use. It was for the jury to say to what extent the plaintiff might rely on the appearances presented, in consideration that the elevator was intended for the use of persons coming from the street, who were to judge, from an open or closed door, whether they might use the elevator. If the jury should find that defendant was responsible for the plaintiff thinking there was no danger, the latter was not required to use caution as to the consequences of going through the door-way.

The defendant's counsel asked the judge to charge "that if the jury believe that the plaintiff, with proper care, such as a prudent man would exercise in like circumstances, could have ascertained whether the elevator was

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there or not, before entering it, he was guilty of contributory negligence. The judge modified this by changing "could have ascertained" to "would have ascertained." It would seem that the judge was correct. If the plaintiff, by the use of ordinary care, called for by the circumstances, as a matter of possibility could have, but as matter of fact would not have ascertained the danger, there was not contributory negligence.

There was the same kind of defect in the request to charge "that if it was light enough at the time to have enabled the plaintiff to have seen that the elevator was not there if he had made the effort to do so, he was bound to look, and if he did not (and he says he did not), he was guilty of contributory negligence." The judge had made the proper charge as to the degree of caution or prudence the plaintiff was bound to use. The jury, if charged as requested, might have found that there was just light enough to have made it possible for the plaintiff to see the danger if he had made an extraordinary effort to see the condition of the elevator, continued through an indefinite time. The plaintiff was, however, bound to make such effort as would be made by ordinary prudence, or the ordinary use of the senses, by prudent men.

The court allowed, against defendant's objection, the plaintiff to put in evidence a part of section 16, chapter 625 of the Laws of 1871, which declared that in any building in the city of New York in which there shall be placed any elevator, the opening thereof shall be provided with a railing, and such good and sufficient trap door as may be directed and approved by the superintendent of buildings, and such trap door shall be closed except when in actual use, etc. The only ground stated for the objection was that there was no allegation in the complaint of any negligence founded upon that section. The action was not upon the statute. The statute was used, as it might be, as a fact, upon which, with the other facts, it might be determined whether the defendant was negligent in leaving the door in question open.

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The question as to the statute is not material, for the other facts proved that the defendant was negligent.
Judgment affirmed with costs.

ELIZA RALLINGS, APPELLANT, v. THOMAS W. PITMAN, RESPONDENT.

Supplementary proceedings—second order—jurisdiction.

▲An affidavit for an order in supplementary proceedings for the examination of a judgment debtor, which, in addition to the usual allegations, states "that the defendant hath been, at divers times heretofore, examined under orders supplementary, previously granted, and no property discovered, but that since the last examination the defendant hath become possessed of certain personal property"—while it states enough to give jurisdiction to the judge to whom the application is made, does not show sufficient reason for the granting of the order for further examination.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided June 2, 1883.

Appeal by plaintiff from order vacating an order for examination of defendant supplementary to execution. The facts appear in the opinion.

Henry H. Morange, for appellant.

Richard M. Bruno, for respondent.—The affidavits upon which the second application is based should show grounds for the examination, such as subsequently acquired property, or the like (*Canavan v. McAndrew*, 20 *Hun*, 46). The affidavit must disclose the previous examination, and show some reason for the second examination, upon which the court may exercise its discretion with respect to granting the order (*Grocer's Bank v. Bayand*, 10 *Week. Dig.* 124). After one examination, no further order should be made, unless the affidavits show that the debtor has subsequently acquired property, etc. (*Carter v. Clarke*, 7 *Rob.* 43; *Jurgensen v. Hamilton*, 5 *Abb. N. C.* 149; *Hamilton v. Morange*, 2 *Law Bul.* 58; *Irwin v. Chambers*, 40 *Super. Ct.* 432).

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Unless the facts necessary to bring the case within the section are proved, the judge has no jurisdiction ; the mere appearance, etc., does not confer jurisdiction (*Sackett v. Newton*, 10 *Hun*, 560 ; *Carter v. Clarke*, 7 *Rob.* 490 ; *De Comeau v. People*, *Id.* 498).

PER CURIAM.—The judge below had jurisdiction of the matter, and it was probably by inadvertence that the order contained the clause that it was granted because the affidavit on which the order for examination was made was insufficient to confer jurisdiction. It is clear that the affidavit did not, under the precedents, state sufficient to give the plaintiff a right to an order of examination. It showed that the plaintiff had divers times used the right of examination, under the Code, in averring “that the defendant has been divers times heretofore examined under orders supplementary previously granted.” It was therefore necessary to show, under the cases, a special reason for another examination. On this point no more was averred than “that since last examination the defendant hath become possessed of certain personal property.” It does not state what the property referred to is; whether it remains in possession of defendant, or whether it may be applied to the payment of the judgment. Nor does it state anything that would make an examination into the existence of such facts proper or useful for plaintiff. What is said must be true of any judgment debtor who has been examined, under any circumstances, and within a very brief time after the examination.

As the statement in the order appealed from was incorrect as to the jurisdiction, and it is now sustained on the merits, it is affirmed without costs to either party.

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**FERDINAND TRAUD, AS EXECUTOR, ETC., APPELLANT,
v. CHARLES A. MAGNES ET AL., RESPONDENTS.**

Real property—when liable for devisor's debts.

When the devisee of real property aliens the same before her death, her personal representative is liable, in a proper case, under Art. 2, tit. 8, ch. 8, part 3, R. S., for the debts of her devisor to the same extent that said devisee was in her lifetime; viz., to the extent of the value of the real property so aliened.

Under said statute, real property which has been devised, and has descended on the death of the devisee to her heirs, may be subjected to the payment of the devisor's debts in like manner as before the death of said devisee.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided June 22, 1883.

Appeal from a judgment entered on the report of a referee.

One James Moore was surety on a bond in which he bound himself, his heirs, executors, and administrators. He died, leaving a will, which was duly proven. By this will he devised a portion of his real estate to three of the defendants, and all the residue of his real estate to Ellen Fagan and Mary J. Magnes. Mary J. Magnes died in August, 1877, intestate, leaving her surviving her husband, the defendant Charles A. Magnes, and the defendants Mary E. Magnes and Charles S. Magnes, her children and heirs-at-law. Letters of administration on the estate of Mary J. Magnes were issued to the defendant, Algernon S. Sullivan, as public administrator, August 7, 1879. Judgment was entered against the executor of James Moore on this bond, March 27, 1879, for \$9,326.92. Proceedings were taken in the proper surrogate's court to enforce this judgment, but nothing was obtained on such proceedings. This action was then (August 19, 1874) commenced, for the purpose, in part, of enforcing the liability of said James Moore, as surety, against so much of her real estate devised by him to Mary J. Magnes as descended to her heirs, and for the further purpose of obtaining a judgment against her

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administrator for the sum which she became personally liable to pay, as provided by statute, by reason of the alienation of certain lands so devised to her by said James Moore.

The action was begun against all the devisees of said James Moore under art. 2, tit. 3, chap. 8 of part 3 of the Revised Statutes (see 3 *Rev. Stat.* 6th ed. 734). It was referred, and the referee dismissed the complaint against the administrator, on the ground that "the statute does not provide a remedy by action against the personal representative of a devisee in a case like the present." The referee dismissed the complaint against the heirs-at-law of Mrs. Magnes, on the ground that the statute in question does not make the heirs of a deceased devisee liable for the debt of the devisor. To each of these conclusions the plaintiff duly excepted. The referee also found that after due proceedings before the surrogate, and at law, as required by statute, the plaintiff was unable to recover any part of the judgment from the personal representatives of James Moore, or from his next of kin, legatees, or heirs.

Elial F. Hall, for appellant.

William J. Curtis, for respondent, Sullivan.

PER CURIAM.—It was the intent of the makers of the statute (3 *Rev. Stat.* 6th ed. 736) that those who take a debtor's real property, either as heirs or devisees, should be compelled to pay such debtor's debts, if the property was sufficient in value; and if it were not, that they should be compelled to pay his debts to the extent of the property which shall have descended, or shall have been devised, to them. If the heir or devisee shall have aliened (that is, transferred) any of the said debtor's property which descended, or was devised, to him before the commencement of the action against them to compel payment of the debt, he shall be personally liable for the value of the estate so aliened. Mrs. Magnes (one of the devisees) in her lifetime aliened a portion of the debtor's real estate which had been devised to her. By so doing she made herself personally

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liable to the value of the real estate sold. Her administrator, as such, is liable for the value of the estate so aliened. Certain other portions of the real estate devised to Mrs. Magnes descended on her death to the defendants, Charles A. Magnes, Mary E. Magnes, and Charles S. Magnes. They stand in the same position to the plaintiff that Mrs. Magnes stood. They have succeeded as well to her liabilities as to her rights. They are liable for the debts of Jacob Moore, whose real estate they hold, to the value of the real estate which has descended to them.

The report of the referee should be modified as above pointed out. It will be remitted to him to make a further report in accordance with the foregoing suggestions, with costs to the appellant, to be paid out of the real estate.

JACOB FLEISCHAUER, RESPONDENT, v. ABRAM J.
DITTENHOEFER, AS RECEIVER, &C., APPELLANT.

Receiver—Action against temporary receiver of corporation.

A cause of action against a corporation for a breach of contract accruing prior to the appointment of a receiver *pendente lite*, in an action to dissolve said corporation, cannot be enforced against the receiver until the corporation is adjudged dissolved, and the order permitting such a receiver so to be sued is not an adjudication as to his liability.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided June 2, 1883.

This is an appeal from a judgment in favor of plaintiff, entered upon the report of a referee, and also from the order of reference.

The action was brought to recover damages for breach of a contract entered into, February 12, 1881, between the plaintiffs and the Economy Packing Company, a corporation organized under the act of February 17, 1848. Subsequent to the breach of the contract, in an action brought to dissolve said corporation, the defendant was duly appointed receiver of the property and effects of said corporation.

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It does not appear that the corporation has ever been dissolved.

A motion to dismiss the complaint on the following ground, among others, was made and denied: "That the receiver is not liable, being only temporary receiver; and the company not being dissolved, action must be commenced against it."

A. A. Cauldwell, for appellant.

Albertus Perry, for respondent.

PER CURIAM.—The plaintiffs have no cause of action against the defendant as receiver of the property and effects of the corporation. The corporation was not dissolved, and a suit against it could proceed to judgment (*Knauer v. Globe Mutual Life Ins. Co.*, 46 *Super. Ct.* 370).

The plaintiffs were authorized by the court that appointed the defendant receiver to commence this action. This was not a determination that the plaintiffs had a good cause of action against the defendant as receiver. The court, in granting leave to sue, was not called to, and did not pass upon the question of the receiver's liability.

The judgment and order are reversed, with costs, and the complaint dismissed, with costs. The order appealed from is affirmed, with \$10 costs.

BARBARA POPFINGER, RESPONDENT, v. HENRY YUTTE, ET AL., APPELLANTS.

Real estate.—Resulting trust for benefit of creditors.—Conveyances in fraud of creditors.—Profits on trust property.

Y. being indebted to R. conveyed to him certain real property as security, and thereafter R. conveyed said property to a third person, receiving as consideration, a mortgage thereon, which he retained in payment of his claim, and a deed of certain other premises, which, at the request of Y., was allowed to go to Y.'s wife, who thereafter exchanged the same for other real property which she sold for \$155. With this money, and \$200

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of her own, she purchased premises which she subsequently sold at an advance of \$5,000 on the purchase price, and with \$5,500 of the amount so received, purchased certain other premises. Plaintiff holding a judgment against Y. for \$494.76, founded on a claim existing at the time of the above occurrences, upon which an execution had been returned unsatisfied, brought this action against Y. and his wife, to have his judgment satisfied out of said property last referred to, etc. The trial judge found that the wife paid no consideration for the property originally conveyed to her, and that she knew of Y.'s indebtedness to plaintiff, and held the property to place it beyond the reach of Y.'s creditors.

Held, that the conveyances to and from the wife were void as to Y.'s creditors, and that said wife took and held and subsequently dealt with the premises originally conveyed to her, as trustee, subject to a resulting trust, under the statute, in favor of said creditors; and further that plaintiff was entitled to an accounting regarding the rents, etc., of the several parcels of land so held by said wife, and to judgment appointing a receiver and directing a conveyance to and a sale by such receiver of said premises, held by the wife at the time of the commencement of the action, and that plaintiff's said judgment be paid from the proceeds, in full, and not merely to the extent of said \$155.

This action was tried before the court without a jury. The plaintiff and the defendants appeal from the judgment rendered. The facts are stated in the findings made by the trial court, substantially, as follows :

Plaintiff recovered a judgment against defendant Henry Yutte, for \$494.76, June 19, 1882. Execution was issued upon said judgment and returned unsatisfied. She thereupon commenced this action to have certain conveyances which transferred the property of Henry Yutte to his wife, the defendant Christine Yutte, declared null and void, and, on the ground of fraud, that the said judgment be declared a lien upon the property held by defendant Christine Yutte, and that a resulting trust in favor of plaintiff be declared upon the real estate held by defendant Christine Yutte. The indebtedness upon which the judgment was recovered existed at the time of the following occurrences: The defendant Henry Yutte in 1877 being indebted to one Reinig conveyed to him, as security for said indebtedness, certain real property upon Long Island, which said Reinig thereafter, at the request of said Yutte, conveyed to Eliza

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Gierke, receiving therefor a mortgage on the premises, which he retained in payment of the said indebtedness to him, and a deed of a house in Jackson street, New York, which he allowed to go to Christine Yutte, the wife of said Henry Yutte, she paying no consideration therefor, and being cognizant of all the facts, including the indebtedness of her husband to the plaintiff, and holding the property for the benefit of her said husband to place it beyond the reach of his creditors. Thereafter, she exchanged said premises for a house in Avenue C, New York, which she subsequently sold for \$155 in cash and certain real property in New Jersey. With this \$155, and \$200 in addition which she borrowed from her son, she afterwards purchased premises in Sixth street, New York, which she sold for \$5,000 more than the purchase price thereof. Thereafter, on July 19, 1882, Christine Yutte, with \$5,500 of the proceeds of the sale of the premises in Sixth street, purchased the land and premises in Chrystie street described in the complaint, and took a deed thereof to herself, which she held at the time of the commencement of the action.

The court found, as conclusions of law: I. That the several conveyances to and by Christine Yutte were void as to creditors of Henry Yutte. II. That the defendant Christine Yutte took and held the premises in Jackson street as trustee, under a resulting trust in favor of the creditors of Henry Yutte. III. That in dealing with said premises and in the several transfers above set forth, the defendant Christine Yutte acted as such trustee to the extent of the interest of said Henry Yutte therein. IV. That the plaintiff has a lien upon the land in New Jersey to the extent of her judgment. V. That the plaintiff is entitled to an accounting for the rents, issues, and profits of the several pieces of land and premises heretofore held by the defendant Christine Yutte in trust for plaintiff. VI. That the plaintiff is entitled to judgment appointing a receiver and directing a conveyance to him by Christine Yutte of the premises in Chrystie street described in the complaint, and directing a sale by said receiver of said premises and lands,

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and directing such receiver out of the proceeds of the sale of the premises in Chrystie street to pay the sum of \$155, with interest from the 13th day of January, 1881, on the plaintiff's judgment besides the costs of this action, with five per cent. allowance, and the costs of such receivership and sale.

The defendants duly excepted to divers of the findings of fact and to all of the conclusions of law of the court. Plaintiff duly excepted to the last conclusion of law, contending in said exception and her proposed findings of law that she was entitled to have all of her judgment paid out of the proceeds of the sale of the Chrystie street property, to be made by the receiver.

Wehle & Jordan, for plaintiff. — I. The defendant Christine Yutte is liable as trustee to plaintiff for the property now held by her. The primary consideration for the Jackson street house moved from the judgment debtor, and by force of the statute of uses and trusts a resulting trust in favor of plaintiff, who was "*at that time*" a creditor of Henry Yutte, ensued, which a court of equity can enforce (2 R. S. ch. I. tit. II. § 52; *McCartney v. Bostwick*, 32 N. Y. 53; *Kamp v. Kamp*, 46 How. 143; *Garfield v. Hatmaker*, 15 N. Y. 475). This is not merely a creditor's bill. It is also an action to enforce a trust. A distinction exists between creditors' bills and actions by virtue of the statute of uses and trusts. In the former the creditor is merely remitted to the lien of his execution, while in the latter he is entitled to invoke the interposition of a court of equity to the same extent as other *cestui que trusts*, as of the date when the fraudulent transfer occurred (*McCartney v. Bostwick*, *supra*). The trust estate, or any of its proceeds, may be followed by the *cestui que trust* through the several transmutations, so long as any part of it is distinguishable (*Stephens v. Sinclair*, 1 Hill, 143).

II. The plaintiff is entitled to the satisfaction of her entire judgment out of the property now in the hands of the defendant Christine Yutte, upon the ground that Chris-

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tine Yutte, as trustee, is bound to account for the gains which she secured with the judgment debtor's property (*Story's Eq. Jur.* §§ 1,210-1,212; *Penman v. Slocum*, 41 *N. Y.* 59).

III. A trustee who intermingles trust property with his own must distinctly point out his own or lose all, and if he deals with the trust estate, the *cestui que trust* may claim the gains (*Tiffany Trusts*, 34; *Seaman v. Cook*, 14 *Ill.* 505; *Russell v. Jackson*, 10 *Hare*, 209).

Conlan & McCrea, for defendants.

BY THE COURT.—TRUAX, J.—We see no reason for disturbing the findings of fact made by the court at trial term. The only question for us to determine is, were the conclusions of law warranted by those findings?

The trial court has found that the transfer made by the defendant Henry Yutte to Reinig was made for the benefit of, and in trust, for the defendant Henry Yutte; and that the Jackson street house was conveyed to the defendant Christine Yutte by Mrs. Gierke as part of the consideration for the transfer to her of the property conveyed by Henry Yutte to Reinig. This being the case the consideration for the Jackson street property was, in fact and in law, paid by the defendant Henry Yutte, and therefore came within the statute of uses and trusts above cited.

The trial court also found that the defendant Christine Yutte exchanged the Jackson street property for a house and lot in Avenue C; that she sold the house and lot in Avenue C for \$155 in cash, and other property; that with this cash and the further sum of \$200, she purchased certain premises in Sixth street, that she sold the Sixth street property and made a profit of \$5,000, over and above the purchase price thereof, and that with the proceeds of this sale she purchased the property in Chrystie street now held by her. The trial court held, as a conclusion of law, that all the money that plaintiff was entitled to obtain from the Chrystie street property, was the sum of \$155, with interest

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thereon from the date of the sale of the Avenue C property. It is of this conclusion that the plaintiff complains.

We are of the opinion that the trial court erred in this respect, and that it should have found that the plaintiff was entitled to be paid the full amount of her judgment, \$494.76, and the interest thereon from the entry of the judgment. The defendant Christine Yutte is bound to account to the plaintiff for the gains she has made from the judgment debtor's property. It is well settled that she was a trustee for the creditors of Henry Yutte, one of whom was the plaintiff, and that she held the property, part of the consideration for which had been paid by Henry Yutte, for the benefit of his creditors, and whatever profit she made by dealing with the property that she held as such trustee inured to the benefit of the creditors of Henry Yutte (*Van Epps v. Van Epps*, 9 *Paige*, 237; *Ten Eyck v. Craig*, 62 *N. Y.* 420; *Flagg v. Mann*, 1 *Sumner*, 486, cited in *Penman v. Slocum*, 41 *N. Y.* 59; see also *Davis v. Leopold*, 87 *N. Y.* 620).

One of the findings of fact to which the defendants object is the finding that the conveyances to the defendant Christine Yutte were made with the intent on the part of the defendants to defraud the creditors of the said Henry Yutte.

The evidence shows that at the time these conveyances were made the said Henry Yutte was indebted in a considerable amount to the plaintiff; that the only property that he had was the property conveyed by him to Reinig, and that the consideration for the transfer to Christine Yutte was paid by the defendant Henry Yutte. The evidence put the burden of proving that the conveyance to Christine Yutte was made in good faith, and without any such intent to defraud, upon the defendants. But they offered no evidence to rebut the presumption created by the statute (2 *R. S.* 1105, 51, 52, *Banks'* 6th ed.) The finding was therefore right (*Dunlap v. Hawkins*, 59 *N. Y.* 342).

This view we have taken of the law disposes of the appeal taken by the defendants.

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The judgment is modified so as to direct the receiver to pay to the plaintiff or her attorneys, said sum of \$494.76, with interest thereon from June 19, 1882. The plaintiff is entitled to one bill of costs on this appeal.

SEDGWICK, Ch. J.—[Concurring.]—I agree in the result of the opinion of Judge TRUAX. It does not seem to me that the so-called profits upon the sale of the Sixth street property are to be attributed to the money she borrowed from her son more than to the money she obtained by the sale of the Avenue C property. These profits were the consequence of the use of the latter as much as of the former (*Gillett v. Bate*, 86 N. Y. 87).

INGRAHAM, J., concurred.

JONAS PHILLIPS, APPELLANT v. JOHN R. TAYLOR,
RESPONDENT.

Contract for delivery of merchandise within specified time. — Waiver. — “Prompt shipment.”

Plaintiff sued to recover the contract price of certain bales of rags sold and delivered by him to defendant, who pleaded a counter-claim for damages for failure to deliver within the specified time, the remainder of said merchandise due under the contracts of sale, by which plaintiff agreed to deliver to defendant a certain number of bales by “prompt steamer shipment,” which the evidence showed meant shipment within two weeks from receiving the order, —and also a certain number by “prompt sail shipment,” which it appeared meant shipment within thirty days from the order.

Held, that to meet the evidence establishing the counter-claim, plaintiff should have alleged and proved any condition of affairs which would have excused his performance of the agreement to deliver, and that defendant was not bound in order to establish his counter-claim, to show that there were opportunities of shipment of which plaintiff did not avail himself.

It seems, it is not error, in such a case, to charge that when plaintiff made the sale, he must be presumed to have the goods which he sold in hand, and to have provided facilities to comply with the contract as to shipment.

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Further held, that in order to establish a waiver of the obligation to deliver at the time specified, there must be shown either such acts of defendant before the expiration of the time, as amount to an estoppel, or after the expiration of the time, an agreement founded on a new consideration.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided November 5, 1883.

Appeal by plaintiff from a judgment in favor of defendant entered on verdict of a jury.

The facts and exceptions are stated in the opinion.

Man & Parsons, for appellant.

John A. Mapes, for respondent.

BY THE COURT.—INGRAHAM, J.—This action was brought to recover the sum of \$1,006.44, the contract price of fifty-six bales of rags delivered to defendant under two contracts for the sale of four hundred and fifty bales at an agreed price per pound, of which one hundred and ten bales were delivered and paid for, and fifty-six bales were delivered and not paid for, and this action was brought to recover the contract price of the said fifty-six bales, so delivered.

From the verdict of the jury, they must have found that the time at which the rags were due here under the contract, was the middle of January or the first of February, 1880. Plaintiff offered to deliver the balance of the four hundred and fifty bales contracted for, but defendant refused to receive them, and claimed damages for the non-delivery of the said balance by way of counter-claim. The jury found in favor of the defendant for \$3,465.18, damages, and after deducting the amount due plaintiff for the fifty-six bales delivered, rendered a verdict in favor of defendant against plaintiff for \$2,863.74.

There were two contracts between the parties, both dated October 29, 1879. One was for two hundred bales, for prompt sail shipment, and one for two hundred and fifty bales, prompt steamer shipment; terms cash in thirty days from delivery. There was evidence tending to show that prompt shipment by sailing vessel meant shipment

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within thirty days from receiving order; and by steamer within two weeks from receiving order.

The two hundred and eighty-four bales were not shipped until after March 1, 1880, and did not arrive in New York until on or after March 25, 1880, when defendant declined to take them on the ground of the long delay in shipment. It further appears that defendant, between the date of contract and the first part of March, sent messages to plaintiff by the broker through whom the sale was made, hurrying the fulfillment of the contract, and that on March 2, plaintiff, to comply with defendants repeated demands, and with his knowledge and without objection from him, telegraphed to his correspondent at Leghorn to ship one hundred and forty-four bales by steamer (that being the balance of the rags unshipped), and in accordance with that telegram, the balance was shipped.

The first intimation that defendant gave that he would decline to receive the balance of the rags was on March 25, 1880.

The plaintiff requested the court to charge that "the burden of proof is upon the defendant to show that there were opportunities for shipping the rags from Leghorn, of which plaintiff did not avail." The court refused to charge as requested, and plaintiff excepted. There can be no doubt but that the burden of proof of the counter-claim was on the defendant. He took the affirmative on the trial and was bound to prove his cause of action by a fair preponderance of evidence; but the court was not requested to charge that defendant was bound to prove his cause of action, but that he was bound to prove that there were opportunities of shipping from Leghorn of which the plaintiff did not avail himself. The plaintiff had sold to defendant the rags, and had agreed that they should be promptly shipped, and the payment was to be cash in thirty days from delivery; and he was bound, under his contract, to ship them promptly and deliver them to the defendant; and if he had been prevented from shipping promptly, by any condition of things which would have excused his perform-

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ance of his agreement, he should have alleged and proved such excuse upon the trial. There was no such allegation in the reply, nor was there any evidence tending to show such an excuse, on the trial (*New Haven & Northampton Co. v. Quintard*, 31 *Super. Ct.* 89). We do not think, therefore, it was error to refuse to charge that the burden was on defendant to prove that plaintiff should not be excused from the performance of his contract.

The judge also charged that, when plaintiff made the sale, he must be presumed to have the goods in hand which he sold, and to have provided facilities to comply with his contract, and to this charge plaintiff excepted. The general term of this court in the case of the *New Haven & N. Co. v. Quintard* (*supra*), held this to be the rule. It appears, however, from what follows the portion of the charge excepted to, that what the court meant to say was, that when a man sells goods and agrees to deliver them at a certain time he cannot excuse himself by saying that he sold the goods expecting to purchase them, but could not purchase them; and the judge then left it to the jury to say from the evidence what the words "prompt shipment" required the plaintiff to do, and whether plaintiff did, or did not comply with his contract by the shipments that he made. Taking the whole charge together, we think that there was no error in this respect of which plaintiff can complain. The same remark applies to the charge that the obligation was on plaintiff to provide means of shipment. What was meant was, that when plaintiff undertook and agreed to "ship promptly" and deliver to defendant, it was part of the agreement that he would provide facilities for such shipment, and we think that if for any reason he should have been excused from such shipment, he must allege the facts justifying such excuse and prove them on the trial.

The only remaining question that requires examination is the contention of the plaintiff that the defendant, in requesting plaintiff to deliver the rags, waived the breach in the contract, or extended the time for the fulfillment of

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the contract. After a careful examination of the whole charge, we are of the opinion that there was no error which requires a reversal of the judgment. The judge charged: "In order for you to find a waiver in this case, you must find that Mr. Taylor, by his conduct before the time when Mr. Phillips should have performed, misled Mr. Phillips so that he shall be estopped from saying I claim damages, because the contract was not performed in time; or, that after the time when the contract should have been performed, a new consideration flowed from one to the other amounting to a consideration for a waiver;" and, after the charge, on the attention of the court being called to the point, said, "I leave it to the jury to say whether the evidence in reference to the importunity of the defendant misled Mr. Phillips and therefore created an estoppel;" and again, the court, in response to a request by plaintiff, said, "If the jury find that the party is misled, and he does acts which he would not otherwise do, and which he would not be bound in law to do if he chose to take advantage of the waiver, then it is sufficient consideration for the waiver."

The general term of this court held in the case of *Hill v. Blake* (48 *Super. Ct.* 253), that after the time of performance was past, an arrangement made between the parties for the performance of the contract at a different time is not binding unless supplemented by a new consideration. That a new contract with a new consideration is necessary to waive the obligation.

We think that the direction of the court in this case was in accordance with the rule as laid down in *Hill v. Blake* (See *Brown v. Bowen*, 30 *N. Y.* 541; *Underwood v. F. J. S. I. Co.*, 57 *Id.* 506).

We do not think that there was any error in the admission or rejection of evidence, that requires a reversal of the judgment.

The judgment should be affirmed with costs.

SEDGWICK, Ch. J., and TRUAX, J., concurred.

Opinion, per Curiam.

ERASTUS T. TIFFT, ET AL., RESPONDENTS v. AARON
T. BLOOMBERG, APPELLANT.

Supplemental answer, when allowed.

Where the sufficiency of a proposed supplemental answer setting up newly discovered facts, is a matter of doubt, the court will not prejudice the validity of the defense on a motion, but will permit the defense to be set up if defendant be free from laches.

Before SEDGWICK, Ch. J., and INGRAHAM, J.

Decided November 5, 1883.

Appeal from order of special term denying defendant's motion for leave to serve supplemental answer.

This is an action for alleged false representations by defendant of the credit of third parties, viz., the firm of D. W. Bloomberg & Co., through which plaintiff sustained damage. After issue joined, defendant, at special term, moved for leave to interpose a supplemental answer, setting out facts, which he claimed transpired after the filing of the original answer, and constituted a defense to the action. The motion was denied on the ground that the new matter did not constitute a defense.

Hall & Jenks, for appellant.

Adolph Ascher & John J. Adams, for respondents.

PER CURIAM.—The supplemental answer sought to be interposed in this action sets up the fact that since the filing of the original answer, the assignees of D. W. Bloomberg & Co., mentioned in the complaint, have paid to the plaintiff six hundred and thirty-four dollars and thirty-four cents, on account of plaintiff's demand, and that plaintiff consented to the assignment, and agreed to accept their proportion of the estate of their debtor, and would relieve and discharge him from their claim. The affidavit on which the application was made, disclosed that on March 1, 1883,

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the defendant first heard of the facts sought to be set up in the supplemental answer. On March 22, 1883, the order to show cause was obtained, and it does not appear that there was any laches in making the application.

Without passing on the validity of the defense set up in the proposed supplemental answer, we think that defendant should have been allowed to present on the trial the facts, and that the validity of the defense should not be disposed of on a motion. It was held by the general term of this court in the case of *Lyon v. Isen* (42 How. 155), that "If the sufficiency of the proposed answer is a matter of doubt, the court will not prejudge the matter on such a motion, but permit the defense to be made."

Without expressing an opinion on the validity of the defense sought to be interposed, we think substantial justice will be better obtained if defendant is allowed to present his defense on the trial, and have it passed on at that time.

Order appealed from reversed, and motion for leave to serve supplemental answer granted. Ten dollars costs, and disbursements of this appeal, to abide the event of the action.

HENRY HESS, ET AL., RESPONDENTS v. ROSALIE RAU,
AS EX'R'X. &C., APPELLANT.

Stockbrokers—"Short sales," nature of—Death of principal, when revocation of authority.

The plaintiffs, as stockbrokers, were employed by defendant's testator to effect for him a "short sale" of certain stocks, the agreements, as construed by the court, being that said brokers should also procure for said testator such stocks, by borrowing the same, or in some other way, to deliver to the purchasers. On October 29, 1880, said testator died, at which time the said stocks, so sold, for his account, were not purchased by his said brokers, and the transaction was not closed. The defendant became executrix, etc., December 29, 1880. On January 5, 1881, plaintiffs duly served on defendant a notice demanding a deposit of margin, or a delivery to them of the shares of stock then short, on or before January 7, 1881, or in default thereof, that plaintiffs would purchase the same, etc.,

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Defendant failed to comply with such demand, and plaintiffs accordingly purchased such stocks, incurring a loss upon the transaction, to recover which, this action was brought.

Held, that the nature of the agreement was such that the death of defendant's testator did not wholly revoke plaintiffs' authority in the premises, and that a judgment in their favor should be sustained.

Before SEDGWICK, Ch. J., and INGRAHAM, J.

Decided November 16, 1883.

Appeal from judgment in favor of the plaintiff for the sum of \$11,042.49, entered on the verdict of a jury.

The action was brought by Hess Bros. & Co., stock brokers, to recover from the defendant, as executrix, an indebtedness of \$9,437.98, with interest from January 8, 1881, arising out of transactions had with defendant's testator. Various exceptions to refusals of the court to charge the jury as requested were taken, which, together with the facts, are set forth in the opinion.

Leopold Wallach, for appellant.—It was error to refuse defendant's requests to charge "that the plaintiffs had no authority after Mr. Rau's death to borrow stocks for account of him or his estate; that the plaintiffs had no authority to purchase stocks for account of Rau or his estate to cover short sales, after a reasonable interval from Rau's death. If the plaintiffs had an interest which continued their authority, the law required them to exercise it within a reasonable time after Rau's death."

I. (a) Whatever liabilities, responsibilities, obligations and duties were respectively assumed by plaintiffs and defendant's testator toward each other must be sought for in the laws relating to principal and agent (*Story Agency* 31, § 23, 9th ed.; *Pott v. Turner*, 6 *Bing.* 702). Their relationship was not changed by their transactions, in effecting their so-called short sales. In the ordinary case of a speculative *purchase of stock on margin*, the relation

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between the parties is that of pledgor and pledgee (*Baker v. Drake*, 66 *N. Y.* 518). In making the purchase, the broker acts as an agent, which is the primary relation. In advancing part of the money to the customer to effect a payment of the stock another relation is created by operation of law, viz. : that of pledgor and pledgee, which is the second relation (*Markham v. Jaudon*, 41 *N. Y.* 235). If no advances are made by the broker for account of the principal, the second relation is not entered into, and the broker remains only agent. In a short sale, the broker sells the stock, borrows it and delivers it to the purchaser, and receives the purchase price, which he applies by giving it to the lender of the stock, the relation here cannot be that of a pledgor or pledgee, as the broker has no property of his client in his hands over which he can exercise the right of a pledge. If advances are made, they are made like other moneys which one pays at request of another, only he cannot be compelled to make these advances except by special agreement, and then for a reasonable time only (*White v. Smith*, 54 *N. Y.* 522).

Plaintiffs being only agents, their authority ceased on the death of their principal (*Story's Agency*, § 462, 9th ed.). It has been held that even insanity of the principal, effected a revocation of the agent's authority (*Motley v. Head*, 43 *Vt.* 633; *Davis v. Lane*, 10 *N. H.* 156, 159). Death of the principal is a revocation of the agent's authority (*Oppenheim v. Leowolf*, 3 *Edw. Ch.* 571). In *Helmer v. St. John* (8 *Hun*, 166), it was held that agency ceased at death, even to do something that was agreed should be done. In *Watt v. Watt* (2 *Barb. Ch.* 371), it was held that death of principal was a revocation of a power of attorney held under him. So held by the supreme court of the United States in *Hunt v. Rousmanier* (8 *Wheat.* 174-217). It was so held in various states (*Saltmarsh v. Smith*, 32 *Ala.* 407; *Yale v. Tappan*, 12 *N. H.* 146-148; *Coney, &c. v. Saunders*, 28 *Geo.* 511; *Lincoln v. Emerson*, 108 *Mass.* 87); and is the law in England (*Lepard v. Vernon*, 2 *Ves. & B.* 51; *Houstown v. Robertson*, 6 *Taunt.* 448; *Story's Agency*, § 488,

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where numerous other authorities are cited). And we have a direct authority in point in a stock case where the broker was held justified in selling the securities immediately upon notice of the death of the principal: *Lacy v. Hill* (*L. R.* 8 *Ch. App.* 921). This case was approved in *Thacker v. Hardy* (*L. R.* 4 *Q. B. Div.* 689; see *L. R.* 18 *Eq. Cas.* 182). Their functions as agents having terminated, it was plaintiff's duty to have closed the account.

II. Under *White v. Smith* (54 *N. Y.* 522), plaintiffs were only bound to carry on these short transactions for a reasonable time; one of these transactions had commenced in June, and none later than August 20; the shortest was in progress seventy days at the time of Rau's death. It cannot be maintained that plaintiffs could not sell without giving notice. *Gruman v. Smith* (81 *N. Y.* 25) distinctly holds, it is at the most a question of possible damages (see *Lacy v. Hill*, *supra*). It would be a dangerous doctrine to require a notice in stock cases, in case of the death of a principal. There may be a contest as to the validity of a will, and before an executor could qualify, a solvent estate might become insolvent through losses by fluctuations in the market price of stocks. There are instances where new and unexpected emergencies and necessities will justify the agent in assuming extraordinary powers, which, if done in good faith and with sound discretion, will bind the principal (*Lawlor v. Keaquick*, 1 *Johns. Cas.* 175-179; *Judson v. Sturges*, 5 *Day*, 556, 560; *Forester v. Boardman*, 1 *Story*, 43; *Leotard v. Graves*, 3 *Caines*, 226; *Williams v. Shackelford*, 16 *Ala.* 318; *Greenleaf v. Moody*, 13 *Allen*, 363; *Story's Agency*, § 885). The death of Henry Rau, and the dangerous fluctuating character of the stocks dealt in, were a sufficient authority to plaintiffs to sell the stocks without notice, and they should so have done.

III. If these plaintiffs had an interest in the subject-matter, on the authority of the cases, they could have exercised it, and the question, whether they had, or were not bound to exercise that authority within a reasonable time after Mr. Rau's death, was a question of fact which should

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have been submitted to the jury (*Greenleaf v. Moody*, 95 *Mass.* 363).

D. M. Porter, for respondents.—I. Short sales are legal (*White v. Smith*, 54 *N. Y.* 522; *Knowlton v. Fitch*, 52 *Id.* 288; *Cameron v. Durkheim*, 55 *Id.* 425).

II. The authority with which plaintiffs were vested by Henry Rau at the time he sold said stocks, was to borrow the necessary stocks to deliver to the purchaser, and to continue borrowing such stocks until they received directions from a properly authorized party to close the transaction by a purchase of stocks to cover his former short sale. Plaintiffs, until so notified, had not the slightest authority to purchase the stocks to cover such short sale and close said transaction. Plaintiffs could not close the account at their own will at an earlier day, because if they did so and the price of the stocks went down, they would render themselves liable to the extent of such decline to the estate, as the executrix could step in after her appointment, and notify them that she repudiated such purchase, and direct them to buy in the necessary stocks to cover such loans, or, as they were termed, short sales, and in such case it would not protect the plaintiffs that they had already done so (*White v. Smith*, 52 *N. Y.* 522; *Lacy v. Hill*, *Scrimgeour's* appeal, 8 *Law R.* 921; *S. C.*, 7 *Eng. R. Moak's Ed.* 473; *Dos Passos on Stock Brokers*, 182).

BY THE COURT.—INGRAHAM, J.—This action is brought to recover the balance due plaintiffs for loss on certain stock transactions conducted by the plaintiffs, a firm of stock-brokers, for the defendant's testator. In the examination of the questions involved, it will not be necessary to say anything about the purchase of the Missouri, Kansas, and Texas stock, and the Atlantic and Pacific Telegraph stock. It appears that there was a profit on the transactions in those stocks, and defendant makes no claim against the plaintiffs in relation thereto. The loss for which plaintiffs claim to recover arose out of the following transactions:

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Plaintiffs claim that in June, July, and August, 1880, they sold by the direction of defendant's testator, 600 shares of the stock of the Delaware, Lackawanna, and Western Railroad Company, and 400 shares of the Central Railroad Company of New Jersey; that these sales were short sales of stock, and plaintiffs were to procure for him such stocks so sold, by borrowing the same, or in some other way to deliver to the purchasers; that the said stocks so sold were not purchased, or the transaction closed, at the time of defendant's testator's death, which occurred October 29, 1880; that letters testamentary on the estate of said Henry Rau were duly issued to the defendant December 29, 1880; that on November 19, 1880, defendant caused to be purchased 200 shares of the stock of the Central Railroad Company for \$16,225; that on January 5, 1881, plaintiffs demanded of the defendant a deposit of margins or a delivery to them of the shares of stock then short, on or before January 7, 1881, or on default thereof, plaintiff would purchase the same at the New York Stock Exchange; that defendant failed to comply with such demand, and plaintiffs purchased said stock at that time, and that there was a loss on the transaction, and a balance due plaintiffs of \$9,437.98, to recover which this action was brought. The jury found a verdict for the plaintiffs. Defendant, at the close of the case, asked the court to direct a verdict for the defendant on the ground that there was no competent testimony to hold the testator liable for the short sales, which motion was denied, and defendant excepted.

The court charged the jury, that if they believed the testimony of the plaintiffs' witnesses, that plaintiffs had made out a case and were entitled to a verdict, to which defendant excepted. Appellant claims that this was error, as there was no competent testimony of the sale of the stock; or that it was sold by the direction of defendant's testator. I think that the evidence introduced by plaintiffs was, if believed by the jury, sufficient to sustain a verdict for the plaintiff. It appeared by the testimony of Frankenbach, plaintiffs' book-keeper, that he made out

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notices for each of the sales ; that he either delivered such notices to Mr. Rau or to his (witness's) assistant, Mr. Fox ; that Mr. Rau came to the office nearly every day ; that witness heard Mr. Rau frequently give orders to sell the stock in question ; that he had several conversations with Mr. Rau about his being short of these stocks ; that one day Mr. Rau asked him to make out a statement of the stocks he was short. and figure out how an average would come if he sold more ; and that witness then stated to him he was short 600 shares of Lackawanna, and 300 shares of New Jersey Central, to which Mr. Rau made no objection : and that on or about September 28, 1880, an account was delivered to Mr. Rau by witness, that showed he was short the stocks in question, which Mr. Rau looked at. and said he supposed it was all right. Fox testified that all the notices delivered to him by Frankenbach, directed to Mr. Rau, he delivered personally to him, specifying notices of several of the sales in question, of which he had distinct recollection. Mr. Hess testified that the stock in question was actually sold by him for Mr. Rau's account. John Rau testified that some time before testator's death, witness spoke to him about a statement from plaintiffs, and he said, "Never mind it now, they (plaintiffs) will not close me out," and there was a written order for the sale of 100 shares of New Jersey Central stock. Plaintiffs were prohibited from giving evidence of any transactions with the deceased, and such evidence uncontradicted and unexplained was sufficient to show, at any rate, a ratification of the sales claimed to have been made for his account. The evidence was not, as appellant seems to assume, offered to sustain an account stated, but simply to prove that the plaintiffs had made the sales in question for him as his brokers, and an acquiescence in such sales. It was an admission by defendant's testator that such sales were made for him under his orders, or a ratification of such sales, and I think the trial judge was right in holding that if the jury believed such testimony, it was sufficient to establish that the stock in question had been sold for the account of the defendant's testator, and

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with his authority. This brings us to the main question in the case.

Mr. Rau died October 27, 1880, and the stock in question was not purchased and the account closed until January 7, 1881; and defendant now claims that the plaintiffs were bound to cover the short sales at the time Mr. Rau died or within a reasonable period thereafter. The rights of, and the duties of the plaintiffs to, defendant's testator, rest on the relation that existed between the parties; and the ingenious argument of defendant's counsel, rests on the assumption that such relationship was one of principal and agent only; that the plaintiffs were simply the agents of the defendant's testator, to sell the stock, and borrow it for him to make good his contract of sale until such time as he should give further directions in regard to it; and that on testator's death such authority ceased. It will be necessary therefore to determine the exact relation that existed between the parties. If no other duty devolved on plaintiffs, then of course the relation between them would be one of principal and agent only, and on the death of the principal, the agency is dissolved and all authority to act for the principal is revoked. Here, however, there was a duty devolved on the plaintiffs in addition to the mere sale of the stock, and it is necessary to determine just what that duty was in order to determine what, if any, change, such a duty would make in the relations between the parties.

There have been many litigations respecting short sales of stock before the courts, and the nature of the transactions have been adjudicated upon by the court of appeals. *Knowlton v. Fitch* (52 N. Y. 288), was a case where the broker, after his customer's margin had been exhausted, notified him that unless he furnished more margin they would buy in the stock. The customer failed to respond and after waiting ten days the broker closed out the transaction without further notice. The supreme court held that such purchase was unauthorized, and gave judgment against the broker. The court of appeals, in reversing the

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judgment says, "It is evident that to carry on such a speculation, the stock sold must be temporarily procured by the seller for delivery to the purchaser. . . . the plaintiff did not furnish the stock to deliver but only the margin; the defendant furnished the stock until bought in, the broker remained bound to the persons from whom they had obtained the stock to return to them an equal number of shares, whatever might be the market price at the time it was demanded." In *White v. Smith* (54 N. Y. 522), Judge EARLE, in delivering the opinion of the court, says, "I am of the opinion that when a broker agrees, for a commission to be paid to him and upon a deposit with him of a margin agreed on, to make a short sale for a customer, it is part of the bargain that the broker shall carry the stock for a reasonable time, for in no other way can the object of the parties be effectual. . . . The broker has not the right, unless it be specially conferred upon him, to buy in the stock, cover the sale and thus close the transaction without some notice to or direction from his customer." He is the agent of his customer and must obey his orders both in making the sale and covering it. "If he acts without orders or against the order of his principal he commits a breach of duty and becomes liable like any agent for any loss he may thus occasion his principal." The court further held that although the margin was reduced below the amount agreed upon, a purchase without notice to the principal was unauthorized and a breach of duty for which the broker was liable. It would appear therefore that the relation of the broker to his customer was something different from that of a mere agent. He was bound, under his agreement with the customer, to furnish the stock for delivery to the purchaser. As Judge EARLE says in *White v. Smith*, "It is part of the bargain that the broker shall carry the stock for reasonable time, for in no other way can the object of the parties be effectual." And if that duty is thrown on him by the terms of his contract or agreement, if the broker is bound to provide the stock for a reasonable time and until after notice to his principal, then the

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converse of the positions must also be true. The principal must be liable to the broker for all loss on the transaction until the broker receives directions from the principal to close the transaction.

The case of *Markham v. Jaudon* (41 N. Y. 235), is cited as an authority to show that the plaintiff was simply the agent of the defendant's testator, but it can be said here, as it was in that case, that so far as the sale was concerned plaintiff was the agent of the testator, but when the sale was made a new relation arose under the obligation of the broker to procure the stock to be delivered under the contract. It was not the relation of pledgor and pledgee, but the parties entered into a new agreement (the agency having ceased with the sale of the stock), and that agreement could only be terminated by the order of the testator, or those having authority to represent him, or by the broker, after a reasonable time, and on notice to testator or his representatives (*White v. Smith, supra*). The principle relied on by the counsel for appellant, that the authority of the agent was revoked on the death of the principal, does not therefore apply. Appellant claims that the broker's authority to borrow the stock was revoked by the death of the principal, and the acts of the broker in borrowing the stock after that time were unauthorized. That argument might apply if the stock were borrowed by the broker as the agent of the testator, but as I think, I have shown the borrowing of the stock, was by the plaintiffs, under their agreement, and not as agent for the testator.

The evidence in the case shows that the plaintiffs did not, when they borrowed the stock, assume to act as the agents of the testator, or of the estate; but they borrowed sufficient stock to complete all the short sales that they had made for their customers. Plaintiffs, and not the estate, were liable to the parties from whom they had borrowed the stock to return an equal number of shares. It did not appear but that the testator was the owner of the stock sold, or had purchased it to be delivered at a future day. He had sold the stock, and had not delivered it to the broker

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to deliver. He was bound to deliver it to his broker to close the transactions when notified by the broker to so deliver; and knowing this obligation, it cannot be assumed that he had not in some way made arrangements to obtain the stock to make such delivery. To hold that the broker would be bound immediately on the death of his principal to purchase the stock, and close out the transaction without the direction of, or notice to, any representative of the principal, would, it seems to me, be much more liable to result in loss to principal than to hold, that on the death of the principal the contract should continue until the appointment of a representative of the deceased, to whom notice could be given, and from whom directions could be received.

The fact that in this case the delay in closing out the contract resulted in a loss to the estate, should not influence the determination of the question involved, but would only show how necessary it is to have a rule established that would enable both of the parties to such an agreement to make such arrangements as would protect them both.

Although the question is not free from doubt, I am of the opinion that the judgment appealed from was right, and should be affirmed, with costs.

SEDGWICK, Ch. J. [Concurring.]—I agree that the judgment is to be affirmed.

PHILIP HAYES, APPELLANT, v. BERNARD REILLY,
SHERIFF, ETC., RESPONDENT.

Assignment in fraud of creditors.—Judge's charge.—Evidence.—Burden of proof.

In an action against the sheriff to recover the possession of certain chattels alleged to have been wrongfully taken under an execution against a third party from whom plaintiff claimed title, where the evidence showed that the transfer to plaintiff was made by said judgment debtor in fraud of creditors and was not followed by change of possession, etc., the judge charged the jury, in the language of the statute, that the transfer was presumptively fraudulent and void as against creditors, and that the

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presumption was conclusive unless it be made to appear on the part of the person claiming under the transfer, that it was in good faith, etc., to which plaintiff excepted. Plaintiff testified that the consideration was \$1,000, and that he paid \$600 in cash, and the rest by satisfaction of an antecedent debt. There was no request to charge that if the jury believed the assignment to have been made for a valuable consideration; the burden was on defendants to show knowledge of fraudulent intent on plaintiff's part.

Held, that a verdict for defendants should not be disturbed, and that the jury were not bound to believe plaintiff's testimony as to the cash payment, he being an interested party.

Further held, that the burden was upon plaintiff to show that goods acquired after the transfer which were levied on by the sheriff, were paid for by plaintiff.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided November 16, 1883.

Appeal from judgment in favor of defendant entered on verdict of a jury, and from an order denying a motion for a new trial, made on the minutes.

The facts and exceptions appear in the opinion.

James Flynn & E. H. Benn, for appellant.

Vanderpoel, Green & Cuming, John Yard and Charles N. Gould, for respondent.

BY THE COURT.—INGRAHAM, J.—The action was brought to recover the possession of certain personal property that had been taken by the defendant as sheriff of the city and county of New York, under an execution against the property of one John Dougherty.

Plaintiff claimed that he had purchased the property on the 17th day of December, 1878, for the sum of \$1,000; of this consideration \$600 was claimed to have been paid in cash, and \$400 by a debt owed by Dougherty to plaintiff. Plaintiff asked the court to direct a verdict on the ground that there was no proof that plaintiff purchased the property with any fraudulent intent, and therefore there were no questions for the jury, which was denied; and the court

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was requested to charge that there was no evidence of a fraudulent intent, which was refused.

The parties to the pretended assignment were brothers-in-law. The evidence to show the good faith of the assignment consisted of the testimony of the parties to such assignment. Dougherty continued in charge of the business, bought and sold goods, and, as plaintiff says, "had power to sell, buy, and run the place." Plaintiff kept no bank account; says he paid Dougherty \$200 in gold and \$400 in bills, and took no receipt. Plaintiff did not put his name on the place, and did not inquire whether Dougherty owed any debts or not. The statute makes the questions of fraudulent intent a question of fact, and I think that there was sufficient evidence to go to the jury on the question of fraud, and sufficient to justify the jury in finding that the sale was made by Dougherty with the fraudulent intent to put the property and business out of the way of creditors, and that plaintiff joined with him, to assist him in such purpose, with knowledge of his intent.

The learned court charged the jury that the first point that they should determine, was whether there had been a visible, open and notorious change of possession from Dougherty to the plaintiff, and that if there was not, then plaintiff was bound to satisfy the jury by evidence that the purchase was *bona fide*, and if he had failed so to satisfy the jury, they should bring in a verdict for the defendant. And subsequently the court charged: "If, on the other hand there was no change of possession, then the whole burden of the case throughout is upon the plaintiff to satisfy you that the purchase was fair, and without any intent on his part to defraud the creditors of Dougherty." To this plaintiff excepted. Section 5 of title 2 of the statute of frauds provides that every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, shall be presumed to be fraudulent and void as against creditors, and shall be conclusive evidence of fraud, unless it be made to appear on the part of the

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person claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchaser. This section the judge repeated in substance to the jury, and then left it to them to say whether there had been such a delivery and change of possession. If there had not been, then the statute, in express terms, throws on the plaintiff the burden of proving that the sale was made in good faith, and without the intent to defraud. It certainly was not error to charge the exact language of the statute.

It is claimed by appellant that because there was evidence that the assignment was for a valuable consideration, that that removed the presumption of fraud, and throws on the defendant the burden of proof, to show that plaintiff purchased with a fraudulent intent. The only evidence of the payment of the \$600 in cash was the testimony of the plaintiff, and he being interested, the jury were not obliged to believe his statement. The court was not requested to charge that if the jury believed that the assignment was for a valuable consideration, that the burden of proof was on defendant to prove that the plaintiff knew of defendant's fraudulent intent. Nor is there any exception that raises that question (*Distin v. Rose*, 69 *N. Y.* 123). If the jury had believed that plaintiff had actually paid the \$600 in cash at the time of the assignment, they would have found that the assignment was *bona fide* under the charge of the court, and the burden of proving that fact was on the plaintiff. He failed to satisfy the jury on that point, and on the evidence as it stands, I do not think that we would be justified in interfering with their verdict.

Starin v. Kelly (88 *N. Y.* 418), relied on by plaintiff, expressly holds that the burden was on plaintiff to show that he had purchased the property for a valuable consideration, and until that was done it was only necessary to show fraudulent intent on the part of the vendor. The jury found that there had been no change in the possession, and the statute made such a finding conclusive evidence of fraud.

Plaintiff claims that as part of the property was purchased

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after the alleged assignment was made, the sheriff had no right to take such property. The jury have found by their verdict that the assignment was fraudulent and void. If so, the business and stock continued, so far as the rights of creditors are concerned, to belong to Dougherty; and if any portion of the goods taken by the defendant had been purchased with money other than that received from the business on their goods, it was the duty of plaintiff to have proved that such was the fact. At any rate, a portion of the goods included in the alleged assignment was included in the property taken by the sheriff, and for such portion the plaintiff was entitled to a verdict.

The only remaining error alleged is in respect to the charge of the court, that if by the arrangement between Hayes and Dougherty it was contemplated that Dougherty should receive one-half of the net profit, that plaintiff and Dougherty were partners, and the sheriff had a right to take the property. That a division of profits and loss is sufficient to constitute the parties partners is well settled, and we think that question was properly submitted to the jury. If the jury had found that they were partners, the sheriff had a right to levy on the partnership property (*Smith v. Orser*, 42 N. Y. 132).

We think therefore that the judgment should be affirmed, with costs.

SEDGWICK, Ch. J., and TRUAX, J., concurred.

THE NORTHAMPTON NATIONAL BANK v. AMOS
M. KIDDER, ET AL.

Negotiable instruments—action to recover stolen railroad bonds—burden of proof.

The ordinary bonds of a railroad company, secured by mortgage upon its property, are negotiable instruments, having all the attributes of such obligations, and the possession and production of them is *prima facie* evidence of title.

Defendants' Points.

Where in an action to recover possession of such bonds, it appears that plaintiff was robbed of them prior to their negotiation to defendant, the burden of proof is shifted, and to overcome plaintiff's title defendant must show that he purchased such bonds in good faith, before maturity, and paid for them a valuable consideration.

To do this defendant must show under what circumstances and for what value he became the holder, and it is not enough that he testify generally that he bought and paid for the bonds at a certain time.

Where a verdict is ordered subject to the opinion of the court at general term, the whole case is before the general term on its merits and no new trial can be ordered.

Before O'GORMAN and INGRAHAM, JJ.

Decided November 16, 1883.

Application for judgment on a verdict of jury, under direction of the court, subject to the opinion of the court at general term.

The facts appear in the opinion.

Peckham & Tyler, for plaintiff.—The burden of proof is all on defendant after we prove loss by robbery, and the case can rest on this alone (*Nat. Bk. of Courtlandt v. Green*, 48 *N. Y.* 298; *Kuhns v. Gettysburg Nat. Bk.*, 68 *Pa.* 445; *Bk. of North Am. v. Kirby*, 108 *Mass.* 497). Waiver of the defaults on our part is not proven, and cannot be presumed (*Ragan v. Day*, 46 *Iowa*, 239; *Penn. Hosp. v. Gibson*, (2 *Mills*, 326). The verdict is to be upheld on any theory sustainable on the facts (21 *N. Y.* 490). It is axiomatic that over-due paper is non-negotiable (*Vermilye v. Adams Exp.*, 21 *Wall.* 138; *People v. Superior Ct.*, 19 *Wend.* 109). This condition broken, the paper is over-due (*Daniels Neg. Ins.* § 1506). The other taints on the paper entitle us to recover also (*Nat. Bk. v. County Coms.*, 14 *Minn.* 78). Defendant's claim as to the burden of proof shows that it was not by surprise that he neglected to prove values, etc. Failure of proof and defect of proof are questions of law.

W. M. Safford, for defendants.—It is clear that the objection that defendants did not pay value for these bonds was not raised on the trial, but that the claim of

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plaintiff was based on the ground that the bonds were over due. There is some evidence tending to show that value was paid by defendants. From the whole case, it is evident that the objection was not even raised, much less relied on at the trial.

Where a material fact is unproved, but objection is not taken at the trial, and some evidence in support of it is given, and the whole proceedings tend to show that it was understood at the trial that no such objection was relied on, the court at general term will disregard the objection (*Porter v. Lobach*, 2 *Bosw.* 188).

In the case of *Wilson v. Rocke*, it was held that both court and counsel having assumed that plaintiff was a *bona fide* purchaser, upon this assumption, plaintiff's title was paramount, and he was entitled to recover. "That the correctness of this assumption could not be disputed upon appeal, as no question in reference thereto was raised upon the trial, and no request made to submit it to the jury" (*Wilson v. Rocke*, 58 *N. Y.* 642).

The burden of proof in the case of negotiable instruments before maturity, does not shift on proof of theft. On the contrary, it has been repeatedly declared by the courts of this country, that the *possession* of such paper was presumptive evidence of title in the holder, and that the burden of proof was upon the person assailing the title of the holder, to show that he was not a *bona fide* holder for value (*Goodman v. Simonds*, 20 *How. U. S.* 343, 365; *Murray v. Lardner*, 2 *Wall.* 110, 121; *Seybel v. Nat. Cur. Bank*, 54 *N. Y.* 288, 301 and 302).

The default of the coupons did not make the principal due (*Cromwell v. Co. of Sac*, 96 *U. S.* 51; *Railway Co. v. Sprague*, 103 *U. S.* 756). Receipt of interest on later coupons was a waiver of default (*Sire v. Wrightman*, 25 *N. Y.* 103; *Conkling v. King*, 10 *N. Y.* 440).

BY THE COURT.—INGRAHAM, J.—This action was brought to recover for the conversion of two consolidated second mortgage bonds of the Ohio and Missouri Railway Company.

It appears that prior to the ninth of January, 1876, the bonds in question were the property and in the possession of the plaintiffs, a national bank, doing business at Northampton in the state of Massachusetts, and that on the ninth of January, 1876, plaintiffs was robbed of a large amount of property, including the bonds in question; that at the time of the robbery the said bonds were not in default but interest had been regularly paid thereon; that the coupons that became due October 1, 1877, were not paid, and had not been paid up to the time of the trial; that on April 28, 1881, defendant purchased the said bonds in the regular course of business at the New York Stock Exchange, from Lucian H. Niles, a member of the Exchange in good standing, and paid therefor. It does not appear, however, what consideration was paid or whether or not any money was actually paid by defendants for the bonds. At the close of the testimony plaintiff requested the court to direct a verdict in favor of the plaintiff. The defendant also requested the court to direct a verdict for the defendant. Neither party requested the court to submit any questions to the jury, and the case must be treated as a question of law, on the facts proven.

That the bonds in question were negotiable instruments and possessed all the qualities and attributes of such obligations is well settled (*Gillespie v. City of Dubuque*, 1 *Wall.* 206; *Murray v. Lardney*, 2 *Ib.* 113). It is also well settled that the possession and production of a negotiable instrument is *prima facie* evidence of title (*Mechanics' and Traders' Bank v. Crow*, 60 *N. Y.* 85; *Murry v. Lardney*, *supra*).

Plaintiff to rebut such presumptions, proved on the trial that the bonds were stolen from the bank in January, 1876. The burden of proof was then changed, and the defendants to sustain their title to the bonds were then required to show under what circumstances and for what value they became the holder (1 *Dan. Neg. Instr.* § 166); in other words, in order to overcome plaintiff's title, it was necessary for defendants to prove that they purchased the

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bonds before maturity, and paid for them a valuable consideration. As a leading English case on this question says, "Where a note is proved to have been obtained by fraud, that affords a presumption that the person who is guilty will dispose of it, and would place it in the hands of another person to sue upon it." Such presumption operates against the holder and it devolves upon him to show that he gave value for it (*Bimby v. Bidwell*, 13 *Mees. & Wel.* 73, cited and approved in *First National Bank v. Green*, 43 *N. Y.* 298; *Porter v. Knapp*, 6 *Lansing*, 125). If defendants failed to prove that they paid a valuable consideration for the bonds, plaintiff was entitled to a verdict.

After a careful examination of the evidence, I have been unable to discover any proof that defendants paid a valuable consideration for the bonds. The only evidence in relation to the purchase of the bonds by the defendants is that given by the defendant Morse. He was first called as a witness for the plaintiff, and on his redirect examination, he first speaks of the purchase of the bonds in question: "That it was in 1881 that we (defendants) paid for the bonds;" and then, "We bought these bonds on April 28, 1881." After plaintiffs rested, Morse was recalled. He again stated that he bought the bonds April 28, 1881. On cross-examination he said he could not swear that he in person bought the bonds, but he knew that the firm purchased them, and finally said, "I would swear that we bought these bonds, paid such a price for them and received them on a given day." In my opinion this was not evidence that the defendants paid a valuable consideration for the bonds. It would be true if the defendants had taken the bonds for an antecedent debt, they would then have "purchased" the bonds and paid for them. Yet it is well settled that such a payment of consideration would not overcome plaintiff's title, and make defendants holders for value (*Phoenix Ins. Co. v. Church*, 81 *N. Y.* 218).

The court of appeals in the case of *First National Bank v. Green* (43 *N. Y.* 300) held that, "a plaintiff suing upon a negotiable note or bill purchased before maturity is presumed,

in the first instance to be a *bona fide* holder. But where the maker has shown that the note was obtained from him under duress or that he was defrauded of it, the plaintiff will then be required to show under what circumstances and for what value he became the holder." In *Ocean National Bank v. Carll* (55 N. Y. 440), the point was, whether plaintiff had failed to prove he was a *bona fide* holder for value, of the note, upon which the action was brought, and the court of appeals reversed a judgment for plaintiff, on the ground that the witnesses who had testified that the note in suit was discounted and that a check produced was given for the avails, made the statement from books and papers and not from their personal knowledge. In this case the evidence was uncontradicted that the note was in possession of the plaintiff before maturity, but the court held this was not sufficient. The consideration must be shown. In *Wylie v. Spencer* (62 How. 110)., Judge VAN VORST, in an action to recover some coupons on bonds stolen from the vaults of the plaintiff, says, "The plaintiff's title is made out by showing the fact of original ownership and that the property had been stolen. If they reached the hands of *bona fide* purchasers before maturity through whom the defendants claim, they must show it." We think upon principle and authority, this to be the true rule. In the case at bar, defendants did not show that they paid any valuable consideration for the bonds, and not having brought themselves within the rule, can not hold the bonds as against the plaintiffs. Many cases could be cited to sustain this proposition, but we think the foregoing are sufficient. Defendants claimed on the argument and cited many cases to sustain their contention that the production of the bonds threw the burden of proving that defendants did not pay a valuable consideration, on the plaintiff. We have examined the cases cited but do not think they are authorities for the defendants. Defendants also insisted that the court should assume that plaintiff did not, on the trial, raise the point that defendants had not paid a valuable consideration for the bonds. It nowhere appears that

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both court and counsel assumed that defendants were *bona fide* purchasers for value. But from all that appears, it may be assumed that defendants resisted their claim, at the trial, as they did on the argument on appeal, on the proposition that the possession of the bonds was presumptive evidence of title in the holder, and the burden of proof was upon the person asserting such title, to show he was not such a *bona fide* holder. This position, as before stated, we do not consider to be well taken. But in no case cited did the appellate court assume a fact to exist for the purpose of reversing a judgment; and in order to set aside a verdict and direct a verdict for the defendants, it would be necessary for the court to assume in this case, that plaintiff paid a valuable consideration for the bonds in question, of which as before stated there was no proof.

If defendants purchased the bonds in good faith, and paid value for them, there could have been no difficulty in their proving such payment, and having failed to give any evidence which would sustain a verdict in their favor, we think the court below was right in directing a verdict for the plaintiff.

When a verdict is ordered, subject to the opinion of the court at general term, the whole case is before the general term on its merits, and no new trial can be ordered (*Durant v. Abendroth*, 69 *N. Y.* 148).

It follows therefore that defendant have failed in their defense, and judgment must be ordered in favor of the plaintiff, on the verdict, with costs.

O'GORMAN, J., concurred.

THE NORTHAMPTON NATIONAL BANK v. LUCIEN
H. NILES.

Before INGRAHAM and O'GORMAN, JJ.

Decided November 16, 1883.

Application by plaintiff for judgment on a verdict of a jury, subject to the opinion of the court at general term.

Statement of the Case.

The facts herein are the same as in the preceding case.

Peckham & Tyler, for plaintiff.

Dixon, Goodwin & Williams, for defendants.

BY THE COURT.—INGRAHAM, J.—In the case of the Northampton National Bank v. Amos M. Kidder, argued and decided with this case,* we held, that the bonds in question were negotiable instruments; that the possession and production of such bonds were *prima facie* evidence of title; but that on plaintiff proving that the bonds in question were stolen from the bank, the burden of proof was changed, and the defendants to sustain their title were then required to prove that they purchased the bonds before maturity, and paid for them valuable consideration, and that defendants having failed to prove that they paid a valuable consideration for such bonds, failed in the defense, and plaintiff was entitled to judgment.

Holding the defendant to the same rule in this case, I am of the opinion that he has failed to prove that he paid for the said bonds a valuable consideration. There is no evidence that defendant paid for the bonds. The only evidence is that of the defendant, who says that he told another witness "that Satterthwaite in London bought them for me." There was no evidence that anything of value was paid for the bonds, or that defendant parted with any valuable consideration for them.

I am therefore of the opinion that judgment must be ordered for the plaintiffs on the verdict, with costs.

O'GORMAN, J., concurred.

* *Ante*, p. 238.

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**GEORGE H. SEELEY, APPELLANT, v. JAMES MORGAN,
ET AL., RESPONDENTS.**

*Corporation.—Ultra vires.—Estoppel, by receipt of consideration.—Evidence.—
• Presumption as to execution of instrument.*

For the purposes of a suit against a third party upon a chose in action held by plaintiff as transferee from a corporation, it is enough if plaintiff prove an existing transfer, which, as against the corporation, vested him with title at the time of delivery or thereafter, though the corporation, its stockholders, or creditors may have had rights that would enable them to avoid or annul such transfer.

Such an assignment which recites the receipt by the corporation of "valuable considerations," and is executed by the treasurer in the name of the company with the corporate seal, and duly proved by a commissioner's certificate, cannot be excluded, on the ground that the evidence shows lack of authority in the treasurer to act for the corporation, there being no proof that the corporation had disaffirmed his act, or offered to return the consideration, or that plaintiff knew of any informality or irregularity in the execution of the transfer.

In such a case, the seal and the treasurer's signature are *prima facie* evidence of execution by proper authority, and there is a further presumption from the seal and the recitals, that the company received "valuable consideration," retention of which operates to estop it, as well as a defendant sued under such transfer, from asserting that it was invalid or had not been made. Nor can the transfer be attacked on the ground that in its execution the provisions of the by-laws and the statute under which the corporation was formed, regulating the manner of transacting its business, were infringed.

It seems that a formal resolution of the directors made after the action upon such assignment is begun, ratifying the act of the treasurer in executing it, is sufficient proof of the existence of an assignment at the time of the beginning of the action. In any event it is admissible as evidence of an actual acquiescence in and ratification of such act before the action.

Before SEDGWICK, Ch. J., FREEDMAN and O'GORMAN, JJ.

Decided December 3, 1883.

Appeal by plaintiff from judgment entered on report of referee dismissing the complaint.

The action was for alleged equitable cause. The plaintiff sought to enforce a cause of action in a Massachusetts corporation assigned to him. He gave facts tending to prove

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the cause of action, and to show that it had been assigned to him he offered in evidence a written transfer signed in the name of the corporation, by its treasurer, with the corporate seal affixed. The referee refused to receive it in evidence, on the ground that it conclusively appeared by the testimony that the person filling the office of treasurer had no authority to sign the name of the company or to affix its seal. The complaint was dismissed solely on this ground. Further facts appear in the opinion.

Stafford, Graff & Roman, for appellant.—I. As the instrument complied with the statutory requisites for documentary proof, it was plaintiff's absolute right that it should be admitted in evidence. (a) The statute is that when an instrument is acknowledged or proved as a conveyance of real property must be for record, "thereupon it is evidence." (*Code Civ. Pro.* § 937). (b) Considering other evidence in order to determine the admissibility of this documentary evidence was error. It was a manifest and utter confounding of the question of admissibility of evidence and of the question of the effect of evidence. The assignment was clearly admissible, and its exclusion was a legal error for which the judgment should be reversed (*C. B. & Q. R. Co. v. Lewis*, 52 *Iowa*, 109-12).

II. Plaintiff having produced an assignment of the cause of action valid on its face, the defendants could raise no further question as to its validity, nor raise the question that the assignment was not authorized by the corporation (*Flint v. Craig*, 59 *Barb.* 332; *Eno v. Crooke*, 10 *N. Y.* 66; *City Bank of N. H. v. Perkins*, 29 *Id.* 566; *Castle v. Lewis*, 78 *Id.* 134).

Passing from an assignment of this character, made under these precise circumstances, to the general subject of a written assignment of a cause of action, the authorities uniformly hold that the production of such an assignment gives the plaintiff a perfect and absolute right to maintain the suit, and bars all further inquiry on that point (*Stone v. Frost*, 61 *N. Y.* 614; *Sheridan v. The Mayor*, 68 *Ib.* 30).

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III. The validity of the written assignment offered in evidence is in no wise affected by statutes or by-laws prescribing methods of formalities of corporate action. (a) Statute or charter provisions, prescribing methods of corporate action merely, confer no rights upon individuals (*Eaton v. Aspinwall*, 19 *N. Y.* 121; *M. E. U. Church v. Pickett*, 19 *Id.* 485-6; *Trustees of V. S. v. Hills*, 6 *Cow.* 23; *Brower v. Appleby*, 1 *San.* 158; *Stafford v. Wyckoff*, 4 *Hill*, 442; *Barnes v. Ontario B'k*, 19 *N. Y.* 152; *Morawetz's Private Corporations*, § 48; *Angell & Ames on Corp.* § 253; *Boone on Corp.* § 99). (b) By-laws of a corporation have no force or effect except between the officers and stockholders. They do not affect the rights of third parties in their transactions with the corporation had in the ordinary and usual way of business among individuals in similar transactions (*Morawetz Priv. Corps.* §§ 46 and 370; *Boone Law of Corp.* § 59; *Angell & Ames on Corp.* § 325; *Driscoll v. W. B. & C. M. Co.*, 59 *N. Y.* 109; *Mechanics' & Farmers' Bank v. Smith*, 19 *Johns.* 123; *State v. Overton*, 24 *N. J. L.* 440). (c) It will be conceded that it is a much graver offence for a corporation to enter into a contract which it has no power to make than it is to omit prescribed formalities in making a contract which it has a right to make; and yet, rights of the parties to it will be enforced, and such a violation of law can be invoked against the corporation only by the state in an action to dissolve the corporation (*Angell & Ames on Corp.* §§ 152-3; *Morawetz's Priv. Corp.* §§ 118-19; *Boone on Corpor.* §§ 99-101; *Kent v. Quicksilver Mining Co.*, 78 *N. Y.* 159; *Whitney Arms Co. v. Barlow*, 63 *Id.* 62; *Groundie v. N. W. Co.*, 7 *Pa. St.* 233; *Grant v. Henry Clay C. Co.*, 80 *Id.* 208; *Natoma Water Co. v. Clarkin*, 14 *Cal.* 552; *Union W. Co. v. Murphy, F. Co.*, 22 *Cal.* 630; *Chambers v. City of St. Louis*, 29 *Mo.* 543; *Martindale v. K. C. & St. J. R. Co.*, 60 *Mo.* 508; *C. B. & Q. R. Co. v. Lewis*, 53 *Iowa*, 113).

IV. One who deals with a corporation is not held to a knowledge of statutes or by-laws prescribing the formali-

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ties of its action, and is not bound to see that they are complied with (*Smith v. Smith*, 62 *Ill.* 497).

V. A formal resolution of the board of directors authorizing the execution of the assignment was not necessary to render the assignment valid (*Conover v. Mutual Ins. Co.*, 1 *N. Y.* 292; *Hoag v. Lamont*, 60 *Id.* 101; *Bank of Middlebury v. R. & W. R. R. Co.*, 40 *Vt.* 160; *Kelsey v. Nat'l B'k of Crawford Co.*, 69 *Pa.* 430). Even if there had been no legally constituted board of directors who could formally authorize an officer to execute the assignment, its execution by him would be valid and would bind the corporation (*Castle v. Lewis*, 78 *N. Y.* 134; *Sherman v. Fitch*, 98 *Mass.* 64).

VI. The assignment is valid. Its execution was authorized. (a) It has upon its face all the *indicia* of being an authorized and valid assignment. It recites that "the Tournaphone Music Company hereby sells, assigns and transfers to George H. Seeley," &c. "In witness whereof the said The Tournaphone Music Company, by its treasurer, F. L. Faulkner, has hereunto set its hand and seal." These recitals raise the presumption that the document was made by the corporation (*Trustees v. McCechnie*, 90 *N. Y.* 628-9; *N. E. Iron Co. v. G. El. R. Co.*, 91 *Ib.* 162-4). It has the seal of the corporation affixed and the presence of the seal alone, without a signature is a sufficient execution by the corporation. *Clark v. Farmers' Mfg. Co.*, 15 *Wend.* 258; *Union Bridge Co. v. T. & L. R. R. Co.*, 7 *Lans.* 244). The presence of the seal is *prima facie* evidence that it was affixed by proper authority (*Trustees v. McCechnie*, 90 *N. Y.* 629). The seal was affixed by the officer who had the custody of it and who was therefore presumptively authorized to affix it. The corporate name being signed by an officer of the corporation, the assignment would be valid and binding without a seal (*Angell & Ames on Corp.* § 219, 228; *Morawetz Priv. Corp.* § 167; *Boone Law of Corp.* §§ 44, 101.) The term "written contracts," in the by-laws does not apply to the assignment in question in this case (*N. E. Ins. Co. v. De Wolf*, 8 *Pick.* 56; *Sanborn v. Fireman's*

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Ins. Co., 16 *Gray*, 448 ; Merchants' Bk. v. Bank of Columbia, 5 *Wheat*. 326 ; Barnes v. Ontario Bank, 19 *N. Y.* 152). Making the assignment was a transaction falling within the scope of the ordinary duties and powers of the treasurer of the corporation (Hoyt v. Thompson, 5 *N. Y.* 354). A single officer of a corporation may direct the institution of a suit in its name and behalf (Am. Ins. Co. v. Oakley, 9 *Paige*, 496). The assignment may have been made simply as means of instituting a suit in the courts of this state, and this is permissible and legal (Peterson v. Chemical Bank, 32 *N. Y.* 21). If it be true that two of the directors had resigned, so that at the time the assignment was executed there were but two directors, while the law required three and the by-laws four, this would not deprive the corporation of power to act (Sherman v. Fitch, 84 *Mass.* 64; Castle v. Lewis, 78 *N. Y.* 133-5; Smith v. Smith, 62 *Ill.* 496).

VII. If the assignment had not been authorized prior to its execution it would have become authorized by ratification. (a) The assignment would be ratified by the failure to repudiate it since its execution became known, which is an admission that its execution was authorized (*Angell & Ames on Corp.* § 304 ; *Morawetz Priv. Corp.* § 304 ; *Boone Law of Corp.* § 104 ; Kent v. Quicksilver Mining Co., 78 *N. Y.* 184 ; S. H. B. Co. v. E. H. B. M. Co., 90 *Id.* 613 ; Sherman v. Fitch, 98 *Mass.* 59 ; Kelsey v. National Bank, 69 *Pa.* 426). (b) The assignment was formally ratified both by the stockholders and by the directors of the Tourna-phone Music Company, May 10, 1883. The assignment was not rejected by the referee as invalid till June 8, 1883. The referee is therefore in error when he says that this formal ratification did not take place until after he had excluded the assignment. The formal ratification was not proved until the referee had once refused to admit it without such proof ; but when he held such proof necessary, it was furnished, and the assignment was then offered again but was still rejected. (c) Ratification is equivalent to prior authorization (S. H. B. Co. v. E. H. B. M. Co., 90 *N.*

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Y. 613 ; *Sherman v. Fitch*, 98 *Mass.* 64 ; *Story on Agency*, § 244 ; *Wharton on Agency*, § 75 ; *Broom's Legal Maxims*, 867 ; *Angell & Ames on Corp.* § 304 ; *Morawetz Private Corp.* § 78). (*d*) It is true that ratification cannot operate retroactively so as to divest rights that have become vested in third parties intermediate the ratification and the act. But the defendants' interest in the subject matter of the transaction ratified is only of that indirect and incidental nature which the retroactive effect of ratification always disregards (*Story on Agency*, § 248 ; *Wharton on Agency*, §§ 80-1 ; *Phillips v. Campbell*, 43 *N. Y.* 271 ; *Morris v. Shulter*, 1 *Mackey* [*D. C.*] 201).

E. S. Babcock, Q. McAdam, and H. T. Ketcham, for respondents.—I. The defendants are entitled to competent evidence of plaintiff's alleged ownership of the cause of action, or to a dismissal, because they are entitled to due proof of every issuable allegation on which they join issue, and because in respect of plaintiff's title they are now expressly authorized by law to raise the defense that he is not the real party in interest, and because they are entitled, if defeated, to a judgment which will protect them from another action for the same cause by any other party (*Hays v. Hathorne*, 74 *N. Y.* 486). The plaintiff below argued that his title "was none of the defendants' business" unless they could show actual *mala fides* in the assignment or notice thereof, and cited *City Bank of New Haven v. Perkins* (29 *N. Y.* 554). The court, from which that case proceeded, have repeatedly criticised as *obiter* the passages in their former opinion, from which the plaintiff seeks aid, and have stripped it of the significance suggested by plaintiff (*Sanford v. Sanford*, 45 *N. Y.* 727 ; *Hays v. Hathorne*, 74 *Ib.* 489).

II. The transaction sought to be proved by the paper offered on the trial was not in the ordinary course of the business of plaintiff's alleged assignor, nor had it been sanctioned by any custom or previous course of dealing on the part of that corporation. That which was attempted to

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be sold was its capital property, and the sale was tantamount to corporate suicide, and would be set aside at the suit of a dissenting stockholder (*Abbott v. Hard Rubber Co.*, 11 *Abb. Pr.* 205-206, *aff'd* 33 *Barb.* 578).

III. On its face the paper when offered was not evidence of the alleged assignment, for it failed to show corporate authority for its execution, the only proof of execution being that contained in the commissioner's certificate, which states the contents of the deposition made by the "subscribing witness"—*i.e.*, the treasurer who executed the paper—before him, and this fails to show either that the corporation or the board of directors authorized the execution. It says only, "being authorized so to *do by the directors of said corporation.*" Though the presence and proof of the seal does under some decisions raise a presumption of authority, yet it is always open to rebuttal, and like any presumption which may be rebutted at all, falls to the ground the moment the fact is shown by direct evidence.

IV. Before the paper was offered plaintiff had proved that from the organization of the corporation to a period long after the commencement of the trial, the corporation had not authorized this act at any stockholders' meeting; that it had never authorized it at any directors' meeting; and that at the time it purports to be made, December 2, 1882, the corporation had no board of directors, and had had none from October 27, 1882, up to a period long after the commencement of the trial, thus destroying the presumption raised by the proof of the corporate seal. In a case quite like that before the court, the court held, against the statutory proof of the document, that it could not be an act authorized by the board of directors, "because there was no meeting of the board for that purpose" (*Murray v. Vanderbilt*, 39 *Barb.* 140).

V. The supposed assignment was imperfect and ineffective, for the further reason that it was not signed by the president and treasurer of the company, as required by the by-laws. A body corporate can act only in the mode pre-

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scribed by the law creating it. To enable its agents to bind the corporation they must act in pursuance of the provisions of the act of incorporation (*Beatty v. Marine Ins. Co.*, 2 *Johns.* 109; *People v. Utica Ins. Co.*, 15 *Ib.* 358; *N. Y. Fire Ins. Co. v. Ely*, 2 *Cow.* 678; *Hosack v. College of Physicians, &c.*, 5 *Wend.* 547). And a by-law adopted in accordance with the law of the State has all the force of a statute (*Presb. Church v. City of N. Y.*, 5 *Cow.* 538; *Stuyvesant v. Mayor, &c.*, 7 *Id.* 588; *McDermott v. Board of Police*, 5 *Abb. Pr.* 422).

VI. The attempted "ratification" at a meeting of the Tournaphone Co. and its directors, held during the trial and after the paper had been twice rejected in court does not aid the plaintiff. The retroactive effect of subsequent ratification cannot be applied to the prejudice of those who are strangers to the transaction, nor especially so as to impair their rights after suit brought (*Dunlap's Paley*, 191; *Story Agency*, §§ 245-246; *Evans Agency*, 74, [*Am. Ed.*] 99, note). Defendants must have the right when notified by the suit of plaintiffs' claim to shape their course by the facts as they exist then. It would be very unjust to compel them to accede to an unlawful claim, because a third party might make it good thereafter by the retroactive effect of a ratification (Lord ELLENBOROUGH, in *Right. dem. Fisher v. Cuthill*, 5 *East*, 496, followed in *Doe dem. Mann v. Walters*, 10 *Barn. & Cr.* 634). The rights of the parties should be determined as they exist at the commencement of the action (*N. Y. Shot & Lead Co. v. Carey.*, 10 *Abb. Pr.* 44-46). And see *Hare v. Van Deusen* (32 *Barb.* 92); *Wattson v. Thibon* (17 *Abb. Pr.* 174); *Tiffany v. Bowerman* (2 *Hun*, 643); *McCullough v. Colby* (4 *Bos.* 603).

BY THE COURT.—SEDGWICK, Ch. J.—The answer of one of the defendants denies that the alleged claim and rights of the Tournaphone Music Company mentioned in the complaint, have been duly or otherwise assigned to the plaintiff, and denies that the plaintiff is the owner of the said claim and rights or any of them. The answers of the other

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defendants make the same denials, and aver "that the plaintiff herein is not the real party in interest, but that the Tournaphone Music Company in the complaint mentioned is the real party in interest," one of the answers averring "that the action in truth is prosecuted by and in the interest, and on behalf of the Tournaphone Music Company . . . which company is the real, and ought to be the nominal plaintiff herein." The learned referee, in his able opinion, expressed regret in having been obliged to exclude the paper presented by the plaintiffs as an assignment, because he was satisfied that the plaintiff had been able to make a *prima facie* cause of action in respect to the other matters charged. On the point on which his decision turned, I do not think it would have been inadmissible for him to have inquired, after the assignment presumptively had been proved, as to the bearing of an averment in the answers that the company which made the assignment was the real party in interest. Such a position possibly may imply that the pleader knew that the company, as a corporation, executed the paper in fact, but executed it for its own, and not for the transferee's benefit. As, however, one of the answers did not contain such a position, no further reference will be made to this matter.

I do not doubt that unless the plaintiffs could show that the company transferred its rights to them, he would have no cause of action, nor that the defendants could interpose all legal objections to the manner of proving this, or to the sufficiency of the testimony to prove it. After sufficient proof had been given to show that the transfer had been made, I am of opinion that the defendants could raise no further question. When once the transfer was perfected, although the corporation itself, the stockholders, or the creditors, might invalidate it for cause, the defendants could not. These propositions do not involve a denial that the defendants may rely for the purpose of showing that the transfer was not made by the company, upon some ground that would also invalidate it after it had been made, but they are confined to the former purpose. The cases of

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Hays v. Hathorn (74 *N. Y.* 486), and Sanford v. Sanford (45 *Ib.* 723), in their allusions to the City Bank of New-haven v. Perkins (29 *Ib.* 554), affect it only so far as any attempt might be made to consider it as authority for a proposition that a defendant, if he raised the issue, might not contest an allegation that the plaintiff was the transferee of the right on which he brought the action as transferee. The law was recognized to be, that if the legal title was in the plaintiff, all methods of assailing the transfer were unavailing to a defendant situated as the present defendants. Sheridan v. Mayor (68 *N. Y.* 30), was cited with other cases to sustain this. The matter is clear in the case of a transferor who is a natural person. It becomes complicated sometimes when the plaintiff claims to be the assignee of a corporation. The only question then that the defendants could raise was whether the paper in proof was a transfer which, as against the corporation, vested title in the plaintiff at the time of delivery, or at any subsequent time. For the purposes of this action, the transfer would be sufficient even though the corporation might have had rights that would enable it to avoid the transfer or to succeed in an action to annul it if the corporation had not exercised such rights. The plaintiff was entitled to the benefit of the transfer if it were not altogether void against the corporation up to the time that the present action was begun.

The case involves the following facts: On the trial the plaintiff offered in evidence a paper purporting to be a transfer by the corporation of certain rights of action, among which was the present right of action. The referee held that there was sufficient proof of its execution in the commissioners certificate attached to it. The case requires us to assume that the seal which made the impression upon the paper was the corporate seal. On the face of the paper F. L. Faulkner appeared to have signed for the company as treasurer and to have affixed the seal. The referee, however, refused to receive it in evidence, on the ground that the testimony in the case showed that F. L. Faulkner had no

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authority from the company to sign for it or to affix its seal, and therefore it was not a transfer by the company. The result was a dismissal of the complaint on this ground.

I am of opinion, that if the paper had been received in evidence, it would not have conclusively appeared that the plaintiff was not the transferee of the company. The decision made, in my judgment, failed to give full effect to the presumptions from the actual execution of the paper, and to the rules of law that bind corporations by estoppel. In *Trustees Can. Academy v. McKechnie* (90 N. Y. 618), it was objected that it did not appear that the person signing as president had been authorized to execute the mortgage. The court said, quoting section 224 of Angell & Ames on Corporations, that: "Where the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority." "The certificate of the acknowledgment of a deed is received without proof of the official character of the officer presenting it. The contrary must be shown by the objecting party." The paper thus being properly in evidence, there would be the further presumption from the seal and the statement of the paper that the corporation, as a corporation, had received the "other valuable considerations" for which the transfer was made, which were in value as great as the thing transferred. This being a presumption against the corporation, it extends to a knowledge of the facts on the part of all having power to act, for the corporation in affirming or disaffirming anything alleged to have been done by an officer without authority. There would be no presumption that the individual who acted for the corporation, and received the considerations retained them personally, but the presumption would be that they went to corporate uses. It is further to be considered that all the officers and all beneficially interested in the corporate affairs, were witnesses in the case. Their testimony is not given, but as the transfer should have been received in

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evidence, unless the evidence otherwise affirmatively showed that it was not the act of the company, it ought to be taken that none of them disaffirmed the transfer. Particular attention will be given to the proof of formal ratification after the action begun. There was no proof that the corporation had returned or offered to return the consideration received by it, nor that the plaintiff knew of any irregularity or want of formality, in what occurred before the execution of the document.

On account of these facts, the corporation, by the laws of this state was estopped from asserting that the transfer was not valid or had not been made. In *Whitney Arms Co. v. Barlow* (63 *N. Y.* 62) the following principles are announced: "It is now very well settled, that a corporation cannot avail itself of the defense of *ultra vires*, when the contract has been, in good faith, fully performed by the other party and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief, or an action in some other form will prevail. The same rule holds if the other party has had the benefit of a contract fully performed, he will not be heard to object that the contract and performance were not within the legitimate power of the corporation." The case approves the opinion of COMSTOCK, Ch. J., in *Parish v. Wheeler*, (22 *N. Y.* 494), "That the executed dealing of corporations must be allowed to stand for and against both parties, where the plainest rules of good faith require."

Upon a corporation coming into existence, besides the special laws of its creation and mode of action, it is the subject of the general law of the land, and therefore bound by equitable obligations. If it receive and use a consideration paid, that affirms the transaction in which it was paid, the corporation is estopped from going into other matters of power, regularity, etc. (*Scott v. Middletown R. R. Co.*, 86 *N. Y.* 200; *Sheldon H. B. Co. v. Eickemeyer H. B. M. Co.*, 90 *N. Y.* 607).

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Without holding that the various objections, taken to the validity of the transfer would be sound, in behalf of the company, if it were not for these considerations, it must be held that, in view of them, the corporation could not raise the objections. It was argued that the foreign statute under which the corporation was formed made it incapable of authorizing the transfer, as that statute required that the business of the corporation should be done by at least three directors, whereas, at the time, there were but two directors; that the by-laws required that the business should be done by four directors, three-fourths of whom should constitute a quorum; that the by-laws directed that all contracts of a certain kind should be executed by the president and treasurer; that no direction was given by such directors as these were, that the transfer should be made. These matters were immaterial, inasmuch as the transfer bound the company by force of equitable principles which was not impaired by any of these matters, and the company would be estopped from setting them up.

Hoyt v. Thompson (5 *N. Y.* 320), illustrates the position that has been taken. In it, it was held that the act of certain officers in affixing the seal of the company, was unauthorized, according to the averments of the bill which had been demurred to. The case was one where the transfer had been made as collateral security for an antecedent debt. Judge PAIGE specifically referred to this, in saying, "But inasmuch, as the state of Michigan received the assignments as collateral security merely for an antecedent debt, the Merced Canal and Banking Company, or its representatives, are not estopped from denying the authority of its president and cashier to execute and deliver the assignment. In a subsequent appeal, after trial on issue of fact (*Hoyt v. Thompson's ex'rs.*, 19 *N. Y.* 207), Judge COMSTOCK held that the corporation, like an individual, might ratify the acts of its agents done in excess of their authority, and that such ratification might in many cases be inferred from an informal acquiescence in and approval of these acts.

In *Murray v. Vanderbilt* (39 *Barb.* 140), Judge INGRA-

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HAM examined the facts to ascertain whether the presumption from the seal being affixed had been rebutted. This one conclusive fact appeared, the seal had been attached to a press, and they having been sold by the sheriff, were bought in by Mr. Cross, who afterwards signed as president, and affixed the seal. There were other important facts, but it clearly appeared that there had been no re-adoption or use of the seal by the company. The assignment was not made upon consideration received by the corporation.

In *Moore v. Rector, &c. of St. Thomas* (4 *Abb. N. C.* 51), the narrowest case was made for the decision of the court. Judge GILBERT says, in his opinion, that the only authority claimed "was derived from a resolution recorded in the minutes of a meeting of the vestry. There were but four vestrymen at the meeting. The act of incorporation said, that no board of trustees should be competent to transact any business unless a majority of vestrymen were present. In the case five vestrymen were required to make a majority. Of course the facts of the case disposed of the presumption on the ground which the parties selected to rely upon.

After the referee had made the decision which has been reviewed, the plaintiff offered to give in evidence a formal resolution of the board of directors of the corporation, made after the action was begun, and which ratified the act of Faulkner in executing for the company the transfer. The proposed evidence was excluded on the ground that if it was not a valid assignment when first offered in evidence, it could not during the progress of the trial be ratified so as to give it retroactive effect as between the litigants in this action without their assent thereto. I am of opinion, however, that however cumulative such a ratification might be, under the facts as they were, yet that it was, in connection with the other facts, some evidence as to whether or not there had not been before the beginning of the action an actual acquiescence and ratification afterwards put in the formal shape of a resolution.

My personal opinion is, that the resolution would have been of itself sufficient and competent proof of an assign-

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ment at the beginning of the action. It was only evidence, and would not have called for a supplemental complaint. And on the facts of this case, I do not perceive that between the time of the assignment and the formal act of ratification there had been anything involved in the issues which conferred at the time, on the defendants, any right which would have made it unlawful or inequitable to give full force to the retroactive effect of a ratification. I prefer not to make a decision on this ground, as it would require the examination of several cases, such as *Tiffany v. Bowerman* (2 *Hun.* 643); *McCullough v. Colby* (4 *Bosw.* 603); *Gilbert v. Sharp* (2 *Lans.* 412); *Bliss v. Cattle* (32 *B.* 325); *Gorham v. Gale* (7 *Con.* 739), and this seems not to be necessary in view of the other facts.

The judgment should be reversed with costs, new trial ordered, and the order of reference vacated.

FREEDMAN and O'GORMAN, JJ., concurred.

BENJAMIN M. STILLWELL, APPELLANT, v. THE
MAYOR, &c. OF NEW YORK, RESPONDENTS.

Municipal corporations—liability as to streets.—Evidence—ordinances, when admissible against city.

No cause of action accrues against a municipal corporation, from the mere fact that its officers have neglected their duty in the enforcement of its ordinances, *e. g.*, in regard to the condition of streets and highways.

In an action for breach of an obligation on the part of a municipal corporation, involving knowledge of certain facts, its ordinances are competent evidence, when they show such knowledge or notice.

In an action for damages against the city for alleged negligence in permitting to remain upon the sidewalk an iron vault-cover, having a surface so smooth and slippery that it did not furnish a sure foot-hold for passengers: *Held*, that ordinances that all vault-covers shall be placed within twelve inches of the area coping, or within twelve inches of the curbstone, and that all sidewalks shall be raised from the curbstone two inches in ten feet, do not of themselves tend to show knowledge on the part of the city that if the provisions thereof are not observed, there will be danger to passengers of slipping on said vault-cover.

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An ordinance directing the removal by certain city officials, of all vault-covers presenting a smooth surface, and the substitution therefor of covers presenting a rough surface and affording a secure foot-hold for pedestrians, etc., while it tends to show knowledge by the city that there was danger of slipping upon a smooth vault-cover, does not enlarge its legal obligations, and to recover for such cause it is necessary to prove neglect in failing to prevent the maintenance of such a cover. The duty of a municipal corporation as to sidewalks, etc., is to use ordinary care to furnish a reasonably safe place to step upon.

The evidence in this case considered and held insufficient to prove that the city was negligent in allowing the vault cover to be placed on the sidewalk or to remain there.

Before SEDGWICK, Ch. J., and O'GORMAN, J.

Decided December 3, 1883.

Appeal by plaintiff from judgment in favor of defendant dismissing the complaint, upon the order of the judge at trial term.

The action was for damages to plaintiff, through the alleged negligence of defendants in permitting to remain in the sidewalk of a street an iron vault-cover having a surface so smooth and slippery that it did not furnish a safe foot-hold for passengers.

On a stormy day, when half melted snow was upon the vault-cover, the plaintiff, stepped upon it, slipped, fell, and was seriously injured. It was claimed that the defendants were negligent in three respects: First, in permitting the cover to remain in the sidewalk; second, in allowing it to remain as placed upon a stone, which and the sidewalk itself, had an unsafe pitch towards the curb; third, in allowing it to remain so far from the curb and from the area coping.

Further facts appear in the opinion.

On the trial, the complaint was dismissed.

Stilwell & Swain and *Charles P. Miller*, for appellant.—The iron vault-cover in the street being there in violation of the city ordinances, both as to its position and nature, was an unlawful and unauthorized obstruction in the street. An unlawful and dangerous obstruction in a public street

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is a nuisance *per se* (Hume v. Mayor, &c., 74 N. Y. 270; Reich v. Mayor, Com. Pl., 17 Week Dig. 140; Wenzlick v. McCotter, 87 N. Y. 126; Mairs v. Manhattan Ass., 89 Id. 503).

The defendants are liable for injury received from a nuisance maintained by them (Hume v. Mayor, 74 N. Y. 270; Dillon Mun. Cor. 2d ed. §§ 794, 795, *et seq.*; 3d ed. § 730, p. 722, note 1). The municipal police are expressly directed by the statute to remove such nuisances or unauthorized obstructions (N. Y. City Consol. Act 1882, § 282; Laws 1864, ch. 403, § 20; Rehberg v. Mayor, &c., 91 N. Y. 137). The police are bound to know the city ordinances prohibiting obstructions, or providing for the safety of the streets; and for the negligence of the police in failing to remove any obstruction prohibited by ordinance, the defendants are liable (Rehberg v. Mayor, &c., 91 N. Y. 143). It was not necessary that the defendants should know that this vault cover was in fact dangerous (Rehberg v. The Mayor, &c., 91 N. Y. 144).

The complaint alleged also that the plaintiff's damage arose from the failure of the defendants to perform their obligation to keep their streets in safe condition for travelers; and there was ample evidence to entitle plaintiff to go to the jury. The plaintiff is entitled to the most favorable inference possible to be drawn from the evidence (Rehberg v. Mayor, &c., 91 N. Y. 138; Clemence v. Auburn, 66 Id. 334). He showed that the vault-cover was raised above the sidewalk; that it was dangerously smooth in wet weather and obviously so; that the portion of the sidewalk in which the coal-cover was placed was out of level, so as to raise the cover still higher; and that the vault cover and sidewalk had long been in this condition; and that a safer cover had come into use; that the defendants had recognized by their ordinances that this vault-cover was dangerous—1st, by its location in the sidewalk; 2d, by its character. These ordinances taken in connection with the proved condition of the vault-cover and sidewalk, and the injury to plaintiff therefrom, are more than sufficient to make out

Respondents' Points.

a *prima facie* case of negligence against the defendants (Reinhard v. Mayor, &c., 2 *Daly*, 249). The ordinances in evidence, are obviously intended to further the fulfillment of the city's obligation; and so far as they are regulations for the guidance of the city's own officers in taking care of the streets, violations of them are competent evidence on the question of negligence (Wood v. N. Y. C. & H. R. R. Co., 70 *N. Y.* 199). That all the ordinances were not enforced, is also evidence of the negligence of the defendants. They show what the corporation regarded as essential—*quoad* vault-covers—to the safe and proper condition of the streets; and a recognition by the corporation that the vault-cover and the sidewalk in this case, formed a dangerous obstruction (Wood v. N. Y. C. R. R. Co., *supra*; Rehberg v. Mayor, 91 *N. Y.* 245).

George P. Andrews, corporation counsel, and D. J. Dean, for respondents.—The corporate authorities are only bound to use reasonable skill and diligence in making the street safe and convenient for travel (*Dillon Mun. Cor.* § 1015; Ring v. Cohoes, 77 *N. Y.* 86). The defendants are not responsible for the accident so far as the same was caused by the mere slipperiness of the walk produced by snow, &c., then falling (*Dillon Mun. Cor.* § 1006; Stanton v. Springfield, 12 *Allen*, 566; Cook v. Milwaukee, 24 *Wis.* 270; McCarthy v. Syracuse, 46 *N. Y.* 194; McGinty v. Mayor, 5 *Duer*, 674; Griffin v. Mayor, 9 *N. Y.* 456; Battersby v. Mayor, 7 *Daly*, 16). In order to establish actionable negligence in respect to the sidewalk and vault-cover, the plaintiff must establish a condition of manifest unsafety, so evident and notorious that it was neglect not to have discovered the dangerous condition and procured the amendment thereof (Masterton v. Mt. Vernon, 58 *N. Y.* 394; Smith v. Mayor, 66 *Id.* 295; McCarthy v. Syracuse, 46 *Id.* 107; Hume v. Mayor, 47 *Id.* 646; Mayor v. Sheffield, 4 *Wall.* 189; Colley v. Westbrook, 57 *Me.* 181; Griffin v. Mayor, 5 *Selden*, 546; *Dillon Mun. Cor.* § 797; 2 *Thompson Neg.* 762; Hart v. Brooklyn, 36 *Barb.* 227).

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If the action of the plaintiff in this case was against the person who caused the vault opening to be made, or who has maintained it, or against the owner who procured the sidewalk to be laid, then the ordinances in question would, as against such persons be some proof of negligence. But it is no proof of neglect against the city, which has committed no act in violation of the ordinances, that its ordinance has been violated by the owner or occupant of the property (*Levy v. Mayor*, 1 *Sand.* 467). A city is not liable for failure to enforce its ordinances (*Fowle v. Alexandria*, 3 *Peters*, 466). The violation of a corporation ordinance does not *ipso facto* create a right of action, where none existed before (*Fuch v. Schmidt*, 8 *Daly*, 318).

BY THE COURT.—SEDGWICK, Ch. J.—The plaintiff was hurt by slipping upon an iron vault-cover in the sidewalk of East Fourteenth street. The cover was about eighteen feet from the curb of the gutter, and about seven feet from what was assumed to be the coping of the area of the adjoining house. In a photograph of the premises no area appears, but the decision did not turn upon there being no area.

The plaintiff read in evidence certain city ordinances; one (§ 188), was that the opening of the vault shall be either within twelve inches of the curb-stone of the sidewalk or within twelve inches of the area in front of the house, under the penalty of one hundred dollars. Another (§ 199), was that the commissioners of police are hereby directed to report to the commissioner of public works the owners or occupants of any store having vaults under the sidewalk, with covering over the opening thereto presenting a smooth surface, and the commissioner of public works is thereby directed to remove such covering and substitute therefor coverings presenting a rough surface and affording a secure foothold for pedestrians, and that any owner or occupant neglecting or refusing to comply with the directions contained in such notification for a period of six months should incur a penalty of \$5 for

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every day in excess of said six months, that such neglect or refusal should continue. Another (§ 99), was that all sidewalks should be raised from the curbstone in the proportion of two inches in ten feet, under the penalty of ten dollars, to be sued for from the person laying the same and the owner of the lot fronting on the sidewalk.

The plaintiff claimed that if these ordinances had been enforced, the accident would not have happened, and therefore their non-enforcement, under the circumstances, gave an action against the city.

It is manifest that the passing of these ordinances, and the city providing officers whose duty it should be to enforce them, are acts indicating care, and are not acts of negligence; and decided cases show that an individual has no cause of action against the city from the officers of the corporation neglecting their duty to enforce ordinances (*Levy v. Mayor*, 1 *Sanf.* 465; *Griffin v. Mayor*, 9 *N. Y.* 456; *Lorillard v. Town of Monroe*, 11 *Id.* 392). If this were not the law, it would be necessary to inquire whether it appeared that the ordinances had not been enforced, or that if they had been, how the enforcement would have prevented the accident.

If, however, irrespective of the ordinances, there was an obligation toward the plaintiff on the part of the city, a failure to perform it giving him a right of action, and that obligation involved knowledge or notice of certain things, then if the ordinances proved that the city had such knowledge or notice, they would be competent evidence, to be properly applied to the facts proven.

The plaintiff's case assumes that it was the duty of the city to use ordinary care and diligence to keep the sidewalk reasonably safe for passers in walking upon it, and that this comprehended the covering of the vault. This duty existed, irrespective of the ordinances. The ordinance in section 192, does not tend to show that the city had knowledge that there was danger to passengers, of their slipping upon a vault-cover, more than twelve inches from the curb of the sidewalk, or more than twelve inches from the coping

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of the area. It implies no more than that there were reasons, which it does not appear were applicable to the danger of slipping. It may have been directed to the chance of passengers stumbling over the cover, or falling into the opening if the cover were displaced.

The ordinance in section 199 seems to imply that there was to the knowledge of the city danger of passengers slipping upon a vault covering, that presented a smooth surface and that did not present a rough surface which afforded a secure foothold for pedestrians. This ordinance, however, did not enlarge the obligation of the city, beyond what the law otherwise deemed to be the duty of the city. In both instances, it would be necessary to prove that the city had been guilty of some want of care, in not preventing the maintenance of a smooth vault cover.

The ordinance in section 99, does not tend to show that it was passed because the city knew that unless the sidewalk was raised from the curbstone in the proportion of two inches in ten feet, there would be danger of passengers slipping upon it, or that the sidewalk would not be reasonably safe from that danger. If the ordinance meant the proportion of two inches in ten feet, and no more, there were other purposes, such as drainage, that were to be subserved by such a pitch and if the danger of slipping was considered, then it intended that such pitch would be safe, while it did not pretend that any particular greater pitch would be unsafe.

The question therefore comes, did the plaintiff make a case, irrespective of these ordinances, which should have been submitted to the jury.

The vault-cover had been upon the sidewalk more than four years, and therefore the city was presumed to know of it being there, or to have been guilty of negligence in not learning of its being there. There was no proof that the city was negligent in allowing the vault-cover to be placed in the sidewalk or to remain there. The duty was, to use ordinary care to furnish a reasonably safe place to step upon. There was no proof that in the performance of this duty, the city

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could resort to any test but the appearance presented by the exterior of the cover. It appeared by a witness for the plaintiff, who had a wide knowledge of the kind of covers used for vaults for many years back, that this cover was of a kind in common use. Of course, if the evidence had otherwise proved that this cover was dangerous, then that it was like other covers in common use, would not have tended to show, that the plaintiff had no action. But when the appearance of the cover is the test, then inasmuch as what is commonly used, may be considered to be reasonably safe, a similarity of appearance would tend to show that there was no negligence. There was no proof that this vault-cover had something peculiar to it, that distinguished it, individually, from others of its class, and that made it dangerous. What has been said particularly applies to the vault-cover as first placed in the sidewalk. There was nothing in the evidence to show that from use, it had apparently become dangerous. Common information enables us to say that continually stepping upon the iron of the cover would make it smooth and slippery at some time, but not at some point of time before the accident, so that it would present an appearance of danger. The evidence on that point was given by the plaintiff himself, who testified that he slipped because it was a smooth surface; that he only noticed the cover after he was taken up, after his fall; that he could not tell how near the center of the cover he placed his foot; that it had been snowing, and that the sidewalk was covered with slush from the melting snow. The vault-cover was produced to the witness, and he was asked: "Where is the smooth surface about that? A. It is all smooth. Q. Where? A. The whole surface, if you put some snow on it you will find it smooth enough. Q. You mean to say, that because it is iron and because these little grooves run from the center to the edge here, it is a smooth surface? Is that what you mean? A. I mean it presents no foothold for the foot, so that on slippery days a man would slip off it, as if it was a piece of ice." It is evident that the plaintiff did not

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mean to testify that there were places on the cover, where the iron had been so worn that they presented a slippery surface, irrespective of the slush that had been on it, at the accident; but that the cover and the slush upon it presented a smooth slippery surface.

It might have been a question for the jury, perhaps, if the condition of the cover before the accident had been sufficiently proven, to say whether it was proper caution to leave the cover as it was, in view of the possibility or probability of a fall of snow making it slippery. The defect is, that it does not appear on this appeal, that before the accident the cover presented such an appearance that the question could go to the jury.

The cover itself was produced on the trial but not on the appeal. A photograph of the sidewalk and the cover in it, was proven. Oral testimony that made reference to its appearance was given. On this appeal, it does not appear that there was an appearance of a slippery surface, or one likely to become slippery when snow fell, in any other sense than would apply to the cover when it was first put in, or indeed, to all vault covers whatever. It appeared that all covers, however rough in construction, would be slippery after the recesses in them were filled with snow.

There was no negligence shown as respects the pitch of the cover and the stone in which it was, being dangerous. It was shown by a witness for plaintiff, that the pitch was not greater than was commonly in use in the streets.

There was no negligence, in respect of the place where the vault cover was inserted in the sidewalk, for as respects the actual cause of the accident defendant's duty is performed when a safe place to walk upon is furnished.

The judgment is further attacked as containing an extra allowance of \$500. This had been granted after the verdict was rendered, but without notice and as the plaintiff thought, *ex parte*. He therefore, made a motion to set the order giving the allowance aside, on the ground that the order should have been made upon notice. I think the denial of this motion was correct, because if there had

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been originally an incorrect practice, the hearing of the motion was practically as to whether there should be an allowance. But I think the amount of the allowance should be reduced to \$100.

Jadgment modified by the reduction of the allowance, and as modified, affirmed with costs.

Order denying motion, as to insertion of allowance, in judgment modified by making the allowance \$100, and as modified, affirmed with costs.

O'GORMAN, J., concurred.

THE PEOPLE, &c. EX REL. EDWARD G. DUMAHAUT,
v. THE BOARD OF FIRE COMMISSIONERS OF THE
CITY OF NEW YORK.

Officers—removal for violation of duty—Intent.

The relator was the chief clerk in the Bureau of Inspection of Buildings of New York city, and his duty was, among other things, to receive applications for permits to alter buildings and generally to direct the operation of the bureau in its practical relation to the enforcement of the building laws, which said laws provided that no alterations shall be made in any building until a plan thereof shall be examined and approved by the Inspector of Buildings, nor until the building has been examined by the department to ascertain if it be in a good and safe condition to be altered. An application for permission to make a certain alteration having been duly filed with relator, he informed the applicant, the Inspector being absent, that he might proceed with the work without the approval of the Inspector, whereupon the applicant proceeded therewith, and the next day the relator sent an examiner to the building, who reported against the application.

Held, that relator's action was illegal and a sufficient ground for his removal from office ; and this, though he acted by direction of the Inspector, his superior ; that it cannot be contended in relator's behalf that what he said was unofficial ; and that what he did being intentional was therefore willful.

Any conduct of the relator's of a personal kind that was likely to result in

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a violation of the building laws was a neglect and violation of his official duty.

Before SEDGWICK, Ch. J., FREEDMAN and O'GORMAN, JJ.

Decided December 3, 1883.

Hearing upon a writ of certiorari, the return thereto, and the papers upon which the writ was granted, under Code of Civil Procedure, § 2138.

The following facts appeared on the record: The relator was chief clerk in the Bureau of Inspection of Buildings, a subordinate bureau of the Fire Department of the city of New York, and charged with the duty of administering and enforcing the building laws of the city (*Laws* 1882, Ch. 410, § 417).

An owner of the building presented himself before the relator while acting as chief clerk of the bureau with plans and specifications for an alteration of the building, and made application in due form for permission from the Inspector of Buildings to proceed with the alteration, and also said that he would like to go on with the alteration before the permission would be given. The relator answered, that it was necessary to have the Inspector's approval, as well as the examiner's report; but as the Inspector was out of town, it could not be done, but that the Inspector having left instructions to act in matters that "we thought the Inspector would approve of during his absence," he, the relator, told the applicant that he could proceed with the work. The applicant began to make the alteration on the day of the application. The next day the relator sent an examiner to the building who, on the following day, reported against the application. The Fire Commissioners notified the relator that they proposed to dismiss him from his clerkship, specifying as the cause of the removal, the facts that have been stated. The relator was heard before the Board, and thereupon was dismissed by order. The relator procured the writ of certiorari to review the proceedings of the Board in the matter.

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A. J. Vanderpoel, and *Geo. B. McCloskey*, for relator.

William L. Findley, for the Fire Department.

BY THE COURT—SEDGWICK, Ch. J.—Section 503 of chapter 410 of the Laws of 1882, enacts, that before the alteration or repair of any building is commenced, the owner shall submit to the Fire Department a full copy of the plans of such proposed alteration and a detailed statement of the specifications in writing, and that the statement and copy shall be kept on file in the office of Inspector of Buildings in the Fire Department; and the alteration shall not be commenced or proceeded with until the statement shall have been filed and said specifications and plans shall have been approved by the Inspector of buildings.

Section 498 declares that before any building shall be altered, the same shall be first examined by the department to ascertain if the building is in a good and safe condition to be altered, and no building shall be altered until after such examination and decision.

The relator was chief clerk in the bureau of inspection of buildings. According to his statement of what he actually did, it was his duty to receive applications for permits to alter, to place the application in the hands of an examiner, whose duty was to examine the buildings, to instruct inspectors of districts, to report violation, of the building laws, to see that the application and the report of the examiner be forwarded to the Inspector of buildings for his action, and to issue to the proper persons the decision of the inspector, in approval or disapproval. Other clerks performed a similar kind of duty. He was the superintendent of their action. His duty, in substance, was to direct the operation of the bureau, in its practical relation to the enforcement of the building laws, under directions of the orders of the department. Any conduct of his of a personal kind that was likely to result in a violation of the building laws was a neglect and violation of the official duty imposed upon him personally. Especially was this true when his conduct by his wrongful act took the

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color of office and was the opposite or negative of the thing he was bound by his office to do. It may have been true, that he intended that in the end the public should have the same protection in the illegal course that it would have had if the law had been respected. But the law had separated the particular thing from its practical consequences, and had unequivocally declared that it should not be lawful. What the relator did was intentional, and therefore willful (*People v. Brooks*, 1 *Den.* 459).

It is said that it was no part of his official duty to give permission to applicants to proceed with their alterations or refuse that permission; and that as this is presumed to have been known to the applicant in this case, what the relator said must be deemed to be unofficial. This position disregards the consideration that the office being one to assist in the enforcement of the law, it is implied that to perform its duties, it will be necessary not to advise or suggest to any one that the requirements of the law may be disregarded.

The relator testified that he took the course he did, in pursuance of what he thought had been the instructions of his superior, the Inspector of Buildings. The Inspector, in fact, had not given such instructions. The instructions that were given had not disregarded the necessity of having the building first examined while the relator told the applicant to proceed to alter before any examination had been made. The instructions, if they had been as the relator testified he thought they were, would not have justified the relator in obeying them, for as they were invalid, the Inspector had no power to give them and it was the relator's duty to disregard them.

The action of the Board in removal is affirmed with costs.

An order should be entered confirming the determination reviewed with costs, fixed at the sum of \$25 and disbursements.

FREEDMAN and O'GORMAN, JJ., concurred.

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MARY L. DAY, RESPONDENT, v. JOSEPH A. JAMESON, ET AL., APPELLANTS.

*Reference—when ordered—long account when directly involved in issues.—
Costs.*

In an action to recover moneys alleged to have been deposited with defendants as bankers, where the answer states that such deposit was made with defendants as brokers, for margin with which to speculate for plaintiff, and sets out a long account showing a counter-claim for losses arising therefrom, the court has power to order a reference, though on the motion therefor, it appears that plaintiff's liability upon the account depends upon the question of her husband's authority to act as her agent. It is within the discretion of the court to deny the motion where the plaintiff offers a stipulation that if such agency be proved, the account will not be disputed; but where it appears that such agency may be proved as to part only of the transactions covered by the account, the general term will modify the denial by providing that it shall be without prejudice to a motion for a reference before the trial judge in a proper case.

Where the order in such a case does not state that the motion was denied on the ground of lack of authority, the defendant will be charged with costs of appeal.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided December 3, 1883.

Appeal by defendants, from an order denying their motion for a reference.

Defendants are stock-brokers. The plaintiff claimed judgment in the sum of \$9,861.43, for money, which she alleged she deposited with them as bankers. The defendants that she deposited the money with them as brokers, as a margin for speculations, and that it was wholly applied by her authority to meet losses by her in those speculations, and that the speculations were made for her by her authority; and they set up a counter-claim of \$2,030.70, for losses not covered by the margin. On the motion by defendant for a reference, it appeared that if the transactions in stock were on her account, it was because she had directed them through her husband as her agent, who was

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the one who, in fact, gave defendants order and directions. To meet the motion, among other objections, the plaintiff offered a stipulation which was recited in the order afterwards made and filed with the papers. It was: "The plaintiff hereby stipulates that if this case is tried before a jury, and the jury or the court decide that the plaintiff's husband was authorized as her agent, to purchase and sell stocks and securities upon a margin in her name, with her money, on deposit with the defendants, that she will not dispute any of the items of the account annexed to defendants answer, but will admit that said account is in all respects correct." The account contained more than two hundred items.

The motion was denied.

Henry A. Root, and *Joseph H. Choate*, for appellants.

Daniel P. Hay, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—I am of opinion that it was within the power of the court below to grant the motion, because the matters to which the account set up in the answer pertained, were directly involved in the defense and counter-claim, and were not collateral to the issue or details of evidence only; and that it was within the discretion of the court to deny the motion, if the stipulation offered by plaintiff would render an accounting before a jury unnecessary. There seems to me to be no doubt, that if the evidence the defendant might produce to show that the plaintiff gave authority to her husband to give orders, etc., to the defendants for her, would be applicable to the matters of account *in solido*, there should be no reference. Further, there should be no reference, if the defense be upon an account stated, but no decision as to this is made, one way or the other.

The defense claims, however, that on the trial, the defendants may be able to show that plaintiff's husband was her agent as to some matters in account, but not as to others, and that the stipulation will not cover the case of

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the jury being obliged to take the whole account, and to make up a new account that excludes those particulars as to which sufficient proof of agency was not given. As to this, perhaps it might be right to think that the defendant should not affect the action of the court upon a possibility, as suggested by them, of a partial failure of proof on their part. But beyond this, while the application of the stipulation may be what it is argued to be by the defendants, yet, on the facts of this case, as shown by its intrinsic nature and the affidavits read, it is not probable that the defendants will, in fact, meet on the trial the danger they fear. To entirely prevent an unforeseen contingency happening, which it may be too late to remedy, a modification of the order should be made, by properly inserting "without prejudice to the court upon the trial directing a reference on motion of defendants, if a reference then appears to be necessary or proper." The order made below does not state that it was made because the court had no power to order a reference. The defendants should, therefore, pay the costs of this appeal.

Order modified as directed, and affirmed as modified, with \$10 costs.

FREEDMAN, J., concurred.

ELIZABETH A. L. HYATT, RESPONDENT, v. JOSHUA
K. INGALLS, ET. AL., APPELLANTS.

Licensee of patent—when estopped from contesting validity of.—Royalties, construction of agreement to pay.—Re-issue of patent.—Jurisdiction.—Judgment.

When a patent is apparently valid and in force, the party using it, receiving the benefit of its supposed validity, is liable for royalties agreed to be paid by him, and he cannot set up as a defense the actual invalidity of the patent under which he is manufacturing. If he intends to manufacture in hostility to the patent, he must give notice of such intention,

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in order that the presumption to the contrary may not attach or the patentee be misled.

Accordingly, where the agreement which contained various covenants for the benefit of the licensee, provided that the license should "continue for the full term of the patent and for any term of any extension, or renewal," and contained the licensee's acknowledgment of the validity of the patent, and his consent that the patentee might, "without prejudice to this agreement, hereafter re-issue, when and as often as she shall choose, the said patent of August 27, 1867, as re-issued August 6, 1878, and a re-issue of said patent was taken out in 1881, in good faith, but which, though substantially for the same invention, did not correspond with the patent nor the prior re-issue, in that it included additional matters not strictly patentable, because not contained in the prior specification, and the licensee continued to manufacture without giving notice that he was hostile to the patent.

Held, in an action for royalties, that the State court had jurisdiction, that the licensee could not interpose the invalidity of said last re-issue as a defense; and that the words "as re-issued August 6, 1878," were words of description and not of limitation.

The patentee, in 1882, served upon the defendants a notice that the license was revoked, and thereafter brought this action for royalties, and a rescission, in which a decree forfeiting the license, etc., was entered and accepted by plaintiff.

Held, that while plaintiff was not by service of the notice, barred from an accounting under the contract, if defendant continued to manufacture thereafter, nor was the court deprived of its jurisdiction thereby; yet, the judgment as a whole must be founded on an affirmance or rescission of the contract, and plaintiff's election to take a decree of rescission entitled her to an accounting only to the date of the decree, and disentitled her to injunctive relief in the State court against future acts.

Before SEDGWICK, Ch. J., FREEDMAN and O'GORMAN, JJ.

Decided December 3, 1883.

Appeal from judgment. The facts appear in the opinion.

F. H. Angier, and *E. D. McCarthy*, for appellants.

Geo. W. Van Slyck, for respondent.

BY THE COURT.—FREEDMAN, J.—A patent for illuminated basements and basement extensions, etc., was issued to the plaintiff in 1867, and re-issued August 6, 1878.

By an agreement, dated November 21, 1878, the plain-

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tiff agreed to, and did, license, among others, the defendants to manufacture and sell within certain territorial limits the articles covered by the patent of 1867, as re-issued in 1878.

The defendants thereafter, manufactured and sold these articles, and up to the autumn of 1881, under the said license, they accounted for the articles so manufactured, and sold and paid royalties thereon. Then they refused to account or pay any longer, though they continued to manufacture and sell, whereupon, in October, 1882, this action was brought, in which the plaintiff, among other things which will be hereinafter considered, asks for a forfeiture of the license, the cancellation of the agreement, and an accounting.

If these were substantially the only facts and the only relief sought, the jurisdiction of the court to entertain the action and to grant relief would be beyond question.

But upon the trial the plaintiff found it necessary to move for leave to amend the complaint by setting up a re-issue of the patent on September 27, 1881. The motion was granted and the amendment allowed, and thereupon leave was granted to the defendants to amend their answer by inserting as follows: "The defendants, answering the amended complaint of the plaintiff, allege that the re-issued patent of September, 1881, is invalid and void, for the reason that it claims more than the patent of 1878; and that its descriptions and specifications do not correspond with those of the patent of 1878; and that it also omits specifications and claims made in the patent of 1878. And further answering, defendants say that the court has no jurisdiction over the issue thus raised."

The trial proceeded upon the issues thus amended, and the plaintiff, upon proof of the re-issue of September 27, 1881, and of the refusal of the defendants to account and pay since that time, though they continued to manufacture and sell, had judgment against the objections and exceptions of the defendants, who throughout insisted that the court had no jurisdiction.

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The questions presented by these exceptions are of great importance.

A grant to a patentee of an exclusive right to manufacture and vend an article described therein, is a grant of property ; and if the validity of the patent is unquestioned, state courts will protect the owner of such property in the enjoyment thereof, by means of a decree of injunction, to the same extent as they would do, were the subject matter of the litigation of any other description. But where the validity of the plaintiff's patent is put in question by the pleadings in a state court, and the defendant presents such proofs upon the trial as render it necessary for the court to examine and pass upon conflicting patents or claims of priority in invention, in order to determine whether the plaintiff has such a property in the subject matter of the grant as entitles him to the exclusive and unmolested use of it, and an objection is taken to the jurisdiction of the court for that reason, the bill must be dismissed ; for, in such cases, the jurisdiction is in the courts of the United States exclusively (*Hovey v. Rubber Tip Pencil Co.*, 33 *Super. Ct.*, 522 ; affirmed 57 *N. Y.* 119).

There is, however, a class of cases in which the defendant cannot question the validity of the plaintiff's patent, because by his contract he has estopped himself from so doing, and of these a state court may take cognizance. In them the question concerning the validity of the patent is merely a question collateral to the main issue, and goes only to the question whether there is a consideration to support the promise to pay. A case arising on a contract to pay royalties, or, in other words, a case between patentee and licensee, falls generally within the class last referred to, and in every such case the true rule to be deduced from the authorities, as stated by the court of appeals in *Marton v. Swett* (82 *N. Y.* 526), is as follows: "Where the patent is apparently valid and in force, the party using it, receiving the benefit of its supposed validity, is liable for royalties agreed to be paid, and cannot set up as a defense the actual invalidity of the patent. The reasons for the

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rule are that the party has got what he bargained for ; that he cannot be allowed at the same time to affirm and disaffirm the patent ; and that he cannot in this way force the patentee into a defense of his right and compel him to try it in a collateral action. While the manufacture goes on under such an apparently valid patent, it is presumed to be under and in accordance with the agreement to pay royalties. If the manufacturer does not so intend, and chooses to make the patented article, not under the patent but in hostility to it, he must give notice of that intention, in order that the presumption may not attach or the patentee be misled. But if the patent is annulled or destroyed by due and effective legal proceedings and priority of invention and a patent is awarded to another, no notice is necessary, for there is no presumption or inference of manufacture under a patent judicially avoided and annulled. It ceases to exist. The manufacture is either absolutely free or an infringement upon the rights of the prior inventor, or in submission to his claims."

Now the parties to the present action, in the agreement of November 21, 1878, and the license executed contemporaneously therewith, did make provision concerning reissues of the patent. By the agreement it was provided that the license should continue for the full term of the patent and for any term of any extension or renewal." The license which was also executed in the form of an agreement under the hands and seals of the parties to this action, contains a similar provision together with the defendant's acknowledgment of the validity of the letters patent and their express consent that the plaintiff may, "without prejudice to this agreement hereafter re-issue, when and as often as she shall choose, the said patent of August 27, 1867, as re-issued August 6, 1878."

These provisions, taken in connection with the other facts already referred to, would seem to be a complete answer, within the rule as stated by the court of appeals, to the claim of the defendants that the court had no jurisdiction to determine the issues, especially as no notice had

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ever been given to the plaintiff that the defendant had elected to manufacture and sell in hostility to the patent as re-issued in 1881.

It is insisted, however, that the words, "As re-issued August 6, 1878," are words of limitation which restrict the consent given to a re-issue that corresponds with the re-issue of 1878; that, inasmuch as the re-issue of 1881 covers more ground than the re-issue of 1878, neither their consent nor their license, attached to it, and that consequently no notice was necessary.

It is true that the re-issue of 1881 corresponds neither with the re-issue of 1878, nor with the original patent, inasmuch as it embraces more ground and more claims than either. To enumerate the points of correspondence and of difference, would serve no useful purpose. Suffice it to say that after all, it is for the same and not for a different invention, and that at most the plaintiff included therein additional matters which perhaps were not strictly patentable because not fairly included in the prior specifications. But it is difficult to perceive why the defendants should be heard to complain of this, as in this respect the re-issue of 1881 was rather a benefit than an injury to them. At any rate the question is not now whether the plaintiff patented too much, but whether the re-issue of the patent was within the contract existing between the parties.

Construing the contract, as I think it should be construed, I cannot satisfy myself that the words now relied on were used as words of limitation in the sense contended for. They evidently were used as words of description. The very object and effect of a re-issue is to make valid specifications which originally were defective and insufficient, and the original patent is therefore deemed to have been continued as re-issued, though the re-issue involves a surrender of the original letters. Nevertheless, the re-issue and the proceedings on which it is founded, have relation to the original transaction. So a second re-issue relates back to the original patent, and not to the first re-issue, and it is a rule in direct proceedings to determine the

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validity of a second re-issue that such re-issue must be compared with the original patent and not with the first re-issue, and that, unless it is on its face for a substantially different invention than the original, it is valid. These matters and considerations must be presumed to have been in the minds of the contracting parties when they completed their agreements. They evidently intended, and their interest was, that both the patent and the license should be made to cover as much as possible, and they contracted accordingly, and other covenants were made with reference thereto. The plaintiff bound herself not to license other new parties except as provided in the agreement, and she also bound herself not to manufacture and sell, herself. The defendants on the other hand, who, up to that time had been infringers and had been sued, on securing immunity from prosecution and in taking the license and accepting the privileges thereby conferred, not only recognized the validity of the patent and agreed to extensions and re-issues, but they also agreed to pay a royalty of 70 cents per square foot, from and after the time of the determination by judicial decree of the validity of the patent, and until such time, 30 cents per square foot, and to continue such payment of 30 cents even after an adverse decision, provided the plaintiff should appeal therefrom within three months. Provision was also made for the prosecution of infringers for the benefit of the licensees. It therefore, clearly appears upon a full consideration of all the covenants between the parties, that in using the words "as re-issued August 6, 1878," it was never intended to provide thereby that any future re-issue should strictly correspond with the re-issue of 1878, but that the defendants, on account of advantages to be derived from other covenants, meant to confer general authority upon the plaintiff to procure re-issues, when and as often as in the exercise of good faith she might deem it proper.

Moreover, the defendants may be deemed to have heretofore admitted that the re-issue of 1881 was necessary and proper. In a suit brought for the benefit of the licensees

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named in the agreement of November 21, 1878, against Tice and Jacobs, the complaint was verified by Ingalls, one of the present defendants. Among other things it alleged that "said patentee finding that said specification was still defective and insufficient, surrendered said patent to the commissioner of patents, in accordance with the statutes of the United States in such cases made and provided, and having amended the claim and specification in accordance with the decision of said commissioner in the premises, and in all other things complied with the statutes of the United States made and provided in such cases new letters patent of the United States for the same invention were, on the 27th day of September, 1881, duly issued and delivered to said Elizabeth Adelaide Lake Hyatt, according to law, and entitled "Illuminating Roof and Roof Pavement," whereby there was granted unto her, for the then unexpired term of seventeen years from the 27th day of August, 1867, the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention and improvement, a description whereof is given in the schedule annexed to the said re-issued letters patent."

From the views expressed, and it further appearing that the re-issue of 1881 was procured by the plaintiff in good faith, and upon the assumption that it was necessary for the preservation of the interests of all parties concerned, and the grant of the re-issue by the commissioner of patents being *prima facie* evidence of the validity of the patent as re-issued, it follows as a necessary corollary, that the defendants, at the trial, could no more be permitted to deny the validity of the re-issue of 1881, than they could have been permitted to deny the validity of the original patent, or of the patent as re-issued in 1878, and that the court had ample jurisdiction to determine the issues and award the proper judgment. The defendants had evidently got from the plaintiff just what they had bargained for, and nothing short of the annulment of the patent re-issued in 1881, by a final decree of the supreme court of the United

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States could relieve them from the obligation voluntarily assumed by them, as long as the plaintiff herself did not rescind on account of the breach committed by the defendants.

The only remaining questions which require to be noticed relate to the measure of relief and the form of the judgment.

The service of the notice by the plaintiff on January 12, 1882, declaring the license forfeited, is not of itself a bar to plaintiff's claim to an accounting under the contract since that time, because the defendants continued to manufacture and sell notwithstanding the notice (*The Union Mfg. Co. v. Lounsbury*, 41 *N. Y.* 363). Nor was this court deprived in consequence of such service of any part of the jurisdiction it otherwise had to grant relief commensurate to the violations of the contract obligations found to have been committed within the issue raised by the pleadings (*Hartell v. Tilghman*, 99 *U. S.* 547).

The court therefore would have had the power not only to direct the accounting which was ordered, but also to grant injunctive relief against threatened continuous violations of the contract, if it were not for one consideration, which is, that the judgment as a whole must be founded either upon an affirmance or a rescission of the contract, for the plaintiff cannot be permitted to affirm in part and rescind in part.

By taking a judgment, as prayed for in the complaint, declaring the license forfeited and directing that the same be delivered up to the plaintiff to be cancelled, the plaintiff elected to take a decree of rescission of the contract which puts an end to the contract and entitles her only to an accounting up to the time of the entry of the judgment and disentitles her to injunctive relief against future acts. This sets her free to license other parties, and to manufacture and sell herself, but it also frees the defendants from the further observance of the obligations of their agreement. Thereafter they can only be proceeded against by the plaintiff as infringers of her patent, and that must,

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be done in the courts of the United States. The fact that the defendants accepted that part of the judgment which directs the surrender and cancellation of the license, and appealed only from those parts by which an accounting was directed and injunctive relief granted, can make no difference. Under the peculiar circumstances of this case as affected by the question of jurisdiction, these different parts of the judgment are not so connected and dependent that it can be held, that the defendants by accepting one waived their right of appeal from the others, especially as the plaintiff can have no right to any other judgment than one which is consistent throughout. Having elected to sue for a rescission, for the complaint expressly asks that the license and the agreements be declared forfeited and be delivered up to be cancelled, and followed up the election by taking judgment in accordance therewith, the plaintiff must be held to her election.

The judgment should therefore be modified by striking from it the injunctive relief granted, by limiting the accounting to the time of the entry of the judgment, and by adding a provision declaring all the agreements between the parties as well as the license at an end, and enjoining all the parties to the action from claiming any right or rights under or by virtue by the said agreements or license subsequent to the entry of the judgment, and as thus modified it should be affirmed without costs to either party upon this appeal.

Order to be entered hereon to be settled on notice.

SEDGWICK, Ch. J., and O'GORMAN, J., concurred.

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THE SHOE AND LEATHER REPORTER ASSOCIATION, RESPONDENT, v. ISAAC H. BAILEY, IMPLEADED, ETC., APPELLANT.

Inspection of writings—when granted.

The provisions of the Code have not changed the chancery rule in regard to a bill of discovery, viz.: that plaintiff may have a discovery of matters necessary to maintain his own title, but is not entitled to a discovery of the title of his adversary, which he denies, and that it only where plaintiff is entitled to the discovery of deeds, etc., for the purpose of establishing his own case that his right to the discovery will not be affected by the fact that the same deeds, etc., are evidence of defendants' case.

Before SEDGWICK, Ch. J., FREEDMAN and O'GORMAN, JJ.

Decided December 3, 1883.

Appeal from order denying defendant's motion, after issue joined, for discovery and inspection of writings.

It appeared from the petition that the action was for an alleged conversion by defendants of the contents of a certain printing office of which plaintiff claimed to be the owner, and that the defense was that the property was taken in execution on a judgment against one Belden, the real owner thereof, and on the 26th of August, 1875, bought in good faith, and for value, by defendants, on a sale by the sheriff; further, that any transfers of the property by Belden to the plaintiff were made in pursuance of a scheme to defraud said Belden's creditors, part of which scheme was the filing of the certificate of incorporation of plaintiff, which was done but one day prior to said sale to defendants. The petition also set forth other facts tending to support the charge of fraud; stated that defendants had remained in undisturbed possession till September 1, 1881, the time this action was begun; and finally prayed an inspection and discovery of any and all conveyance or conveyances in writing, and other instruments in writing upon which the plaintiff or its said attorney intends to rely, or which the plaintiff, or its said

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attorney intends to produce on the trial of this action for the purpose of proving or establishing the title of the plaintiff or its interest in or its right to the possession of the property mentioned in the amended complaint herein.

The affidavits in opposition verified by plaintiff's attorney denied possession or knowledge of such papers by him, and also denied generally the allegations of fraud in the petition.

The motion was denied on the authority of *Andrews v. Townshend* (48 *Super. Ct.* 162).

W. B. Winterton, for appellant.—The application should be granted if it would be just and reasonable to grant it, and it should not be refused on merely technical grounds (*Lefferts v. Brampton*, 24 *How.* 261). The order should be granted when in the exercise of discretion the court deems such discovery proper (*Powers v. Elmendorf*, 4 *How.* 61; *Code Civ. Pro.* §§ 807, 803, 806; 2 *R. S.* 199, § 21; 3 *Ed.* p. 262). "As the object of this jurisdiction in cases of bills of discovery is to assist and promote the administration of public justice in other courts, they are greatly favored in equity" (2 *Story Eq.* § 1488).

Andrews v. Townshend, a case of ejectment, is not an authority against the motion. We set up a general scheme of fraud that antedates the suit itself, which is a part of the fraud, and one of the fraudulent acts was making fraudulent and merely colorable conveyances to hinder and delay creditors. That the allegations of fraud will sustain the motion, see *Brevoort v. Warner*, 8 *How.* 326; *Apthorpe v. Comstock*, *Hop.* 149; 8 *Cow.* 386, 1 *Dan. Ch. Pl. Pr. Perkins' Ed.* [4 ed. 579], 632. Where either party shows conclusively that the evidence sought is material to his case, their right to a discovery is not affected by the fact that it is also material to the case of the adverse party (*Riccard v. Inclosure Comm.*, 4 *Ell. & Bl.* 329; *London Gas Light Co. v. Chelsea*, 6 *C. B. U. S.* 411). Sections 1490–1493, 2 *Story Eq. Jur.*, show the application of the rule as to production of title papers, and that it has primary

Respondent's Points.

reference to questions of title to land between heir and devisee and the like (1 *Sand. Ch.* 98, *supra*), and that the rule, even in such cases, is not sweeping or inflexible. And see *Story Eq. Pl.*, §§ 591-594; HARRIS, J., in *Powers v. Elmendorf* (4 *How. Pr.* 61 *et seq.*).

That the court will assume that the papers can be produced, and that defendant is entitled to an inspection. See *Lefferts v. Brampton* (*supra*); *Hepburn v. Archer*, (20 *Hun*, 537); *Amsinck v. Northrup* (12 *Week. Dig.* 573); *Thompson v. The Erie Railway Co.* (9 *Abb. N. S.* 212); *Casard v. Hinman* (6 *Duer*, 695); *Kimberly v. Sells* (3 *Johns. Ch.* 467); *Price v. Harrison* (8 *C. B. N. S.* 617).

Henry Brewster, for respondent.—This application is in the place of the former bill of discovery in the court of chancery (2 *R. S.* 199; *Townsend v. Lawrence*, 9 *Wend.* 458). One of the rules there was that the discovery must relate to the title of the party seeking the discovery, and the evidence must be for him and not as to the title of the opposite party (*Story's Eq. Pl.* § 317; also, note 2, p. 258; *Cooper Pl.* 58, 197; *Mitford Pl.* 189).

This rule also applies to proceedings under the Code (*Brevoort v. Warner*, 8 *How.* 321; *Davis v. Dunham*, 13 *How.* 428; *Commercial Bank of Albany v. Dunham*, 13 *Id.* 545; *Pegram v. Carson*, 18 *How.* 522; *Strong v. Strong*, 1 *Abb. N. S.* 233; *Andrews v. Townshend*, 48 *Super. Ct.* 162; 2 *Wait's Pr.* 531).

The law does not authorize a discovery as a precautionary measure or to enable a party to prepare to answer his adversary's case. It must appear to be necessary (*Woods v. Figarine*, 25 *How.* 528; *Campbell v. Hoyer*, 2 *Hun*, 309; *Holtz v. Schmidt*, 2 *J. & S.* 28-31).

The existence of the papers must be shown positively, and that they are material and contain material evidence (*Speyers v. Forstitch*, 5 *Rob.* 606; *Walker v. Granite Bank*, 4 *Barb.* 39; 19 *Abb.* 111; *Harrison v. Vanvalkenburgh*, 5 *Pun.* 454; *Mott v. Consumers' Ice Co.*, 2 *Abb. N. C.* 144).

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BY THE COURT.—FREEDMAN, J.—Upon an application for a bill of discovery the rule in chancery was, that the plaintiff might have a discovery of matters necessary to maintain his own title, as for example, deeds under which he claimed. But he was not entitled to have a discovery of the title of his adversary from whom he sought the discovery and whose title he denied. It was only when the plaintiff was entitled to a discovery of deeds or documents for the purpose of establishing his own case, that his right to such discovery was held to be not affected by the circumstance that the same deeds or documents were also evidence of the defendants' case. These principles have not been abrogated or changed by the Code of Civil Procedure.

In the case at bar, the applicant did not bring himself within the exception, for the allegations and the prayer of his petition show, that all he wanted was to discover and inspect conveyances and instruments in writing which he could not specify, which he did not even know to exist, but which he suspected the plaintiff might produce on the trial for the purpose of establishing its title to, or its interest in, or right to the possession of, the property mentioned in the amended complaint.

The order should be affirmed, with costs.

SEDGWICK, Ch. J., and O'GORMAN, J., concurred.

JANE L. MELVILLE, APPELLANT v. ANDREW J. MATTHEWSON, RESPONDENT.

Motions—renewal of—when leave must be obtained.—Reopening of judgment—order upon.

A motion addressed to the discretion of the court cannot be renewed upon the same or substantially the same state of facts, unless leave thereto has been obtained; and failure to obtain such leave furnishes ground for reversal of the order granted on the second application.

A motion to reopen a judgment, addressed to the discretion of the court, should not be granted where the applicant fails to establish either default, surprise, inadvertence or excusable neglect.

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Upon an application to reopen a judgment, after trial upon the merits, before a referee, appointed to try the whole issues, an order cannot be made directing the referee to take certain testimony concerning the issues and report with his opinion to the court the judgment meanwhile to stand as security, etc. A judgment on a referee's report cannot be so reviewed.

Before SEDGWICK, Ch., J., and FREEDMAN, J.

Decided December 3, 1883.

Appeal from order opening judgment, and referring case back to referee. The facts are stated in the opinion.

John Sidney Davenport, for appellant.—Failure to obtain leave to renew is ground for reversal (*Hall v. Emmons*, 8 *Abb. Pr. N. S.* 451). Leave to renew could not properly have been granted if applied for, inasmuch as on the second motion no facts not stated at the first were adduced (*Pattison v. Bacon*, 12 *Abb. Pr.* 142).

If there are any additional facts, there is no pretense that they are discovered since the first motion. A party moving cannot bring forward his objections by installments (*Mills v. Thursby*, 11 *Abb. Pr.* 114).

In the absence of the first order, the second order was beyond the power of the judge.

It is an order of reference to take testimony on the issues in an action, after trial and judgment, while the judgment is in force. No authority is cited against it, because it is believed to be absolutely without precedent. The jurisdiction of the court over the subject matter of the action, and over the parties, in respect to all matters involved in it, terminated with the entry of final judgment therein, except to enforce the judgment or correct mistakes in the record (*Kamp v. Kamp*, 59 *N. Y.* 215).

Nelson J. Waterbury, Jr., for respondent.

BY THE COURT.—FREEDMAN, J.—The action was brought for the conversion of moneys consisting of rents collected by the defendant as plaintiff's agent. The defendant was arrested and gave bail. He also answered putting in issue

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the amount claimed by the plaintiff and setting up counter-claims of which he served a bill of particulars. The counter-claims were put in issue by a reply. The issues were referred to a referee to hear and determine the same. The defendant appeared before the referee by counsel, and, after having obtained an adjournment, proceeded with the trial on the day to which it stood adjourned, and in the course of it expressly waived the cross-examination of plaintiff's witnesses. Plaintiff proved her case by these witnesses and rested. Defendant's counsel obtained another adjournment, and on a subsequent day the defendant was sworn and his examination in his own behalf commenced. Before he had said anything material, he stopped, refused to offer any further testimony, and left the room. Thereupon, the referee determined the amount due to the plaintiff, and upon his report judgment was on October 16, 1882, entered in favor of the plaintiff against the defendant for \$2,618.60.

On October 18, 1882, execution against the property was issued and returned unsatisfied December 4, 1882. On December 23, 1882, execution against the person was issued, and while that was still outstanding, the defendant, on April 6, 1883, obtained an order to show cause from the chief judge of this court why said judgment should not be opened, vacated and set aside, and why defendant should not be restored to his hearing therein, and for such other relief, etc." This motion was, after argument, denied by the chief judge, and the denial was accompanied by the following opinion, viz: "There is no ground on which the judgment can be opened, there being no default, no surprise, no inadvertence. In addition to this, the laches have been so great that to overlook them would be a bad precedent. Motion denied." On May 1, 1883, an order denying the motion was duly entered. On May 16, 1883, the defendant obtained from another judge another order to show cause, and therefore, after opposition and hearing, the following order, which is the order appealed from, was entered on May 25, 1883, viz: "That the judgment be opened so

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far as to permit, and this action is hereby referred back to the referee by whom the same was tried, to take the cross-examination of the witnesses of the plaintiff; defendant to produce such witnesses and such testimony as the defendant may be advised to submit, and report the same with his opinion thereon to the court; that the said judgment meanwhile stand as security, and that in all other respects the said motion be denied, without costs to either party as against the other. And it is further ordered, that the referee proceed on one day's notice by the attorney for the defendant."

This order should not be allowed to stand for two reasons. (1.) Because no leave to renew the motion had been obtained; and (2.) Because it would have been improper on an original motion.

As to the first: The first and the second motion were essentially the same. Both were addressed to the discretion of the court. Aside from a few additional, but wholly immaterial facts, concerning which there was not even the pretence that they had been discovered since the first motion, there were no facts presented on the second motion which were not presented on the first. The affidavits were simply re-shaped to conceal, if possible, their identity in substance, and even then a balance was admitted to remain due to the plaintiff. Under such circumstances, failure to ask for and obtain leave to renew, is ground for reversal. This is within the decision of this court in *Hall v. Emmons* (32 *Super. Ct.* 396), so far as the same was approved by the court of appeals in 9 *Abb. Pr. N. S.* 370.

As to the second: On the second motion the defendant failed, as he had done on the first, to establish a default, surprise, inadvertence, or excusable neglect. His laches remained about the same. Beyond all that no authority can be found for making the order in the form it was made. It is an order directing a referee to take, after trial and judgment upon the merits, testimony concerning the issues and to report the same with an opinion. For what purpose the order does not specify. It cannot be for the informa-

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tion of the court in determining the motion, for the motion was determined by granting to the defendant a re-hearing in the manner specified and denying him any other-relief. But if it were, it would involve an improper mode of taking proof in support of a motion. The order clearly is one which directs the taking of testimony generally concerning the merits of an action already determined to enable the court to judge, at a subsequent period, and on a new application to be made for the purpose, whether the issues were correctly determined. In other words, the order is intended to serve as the foundation for a future review of the judgment on the merits. In this aspect the new difficulty presents itself that, on the coming in of the testimony with the referee's opinion thereon, the court could not act on it, for a judgment on a referee's report cannot be reviewed in such manner, and by such means, any more than a judgment entered upon the verdict of a jury. The remedy is by appeal.

If the case were a proper one, we might perhaps remodel the order so as to provide for an opening of the judgment and a re-trial of all the issues by the referee. This could only be done, if at all, upon terms. But upon the facts as presented I do not think it should be done.

The order appealed from should be reversed with costs.

SEDGWICK, Ch. J., concurred.

THE INYO CONSOLIDATED MINING, &c. CO.,
APPELLANT, v. THOMAS B. PHEBY, RESPONDENT.

Inspection of books, vouchers and accounts—when granted to enable defendant to frame his answer.

Where the action is brought to recover the amount of a balance of moneys, alleged to have been received by defendant as plaintiff's agent, and the complaint is drawn upon the face of certain accounts so rendered by defendant, he is entitled to an inspection of the same, and of the vouchers filed by him in support thereof, to enable him to frame his answer.

Appellant's Points.

Though the complaint contain an averment that defendant "refuses to pay said balance and has converted the same to his own use," it will not be held on a motion for inspection, etc., that the averments as to the accounts, are immaterial for the purposes of defendant's said motion.

In such a case defendant should be allowed an inspection of his books of account as such agent, if necessary to enable him to meet the appearance of the accounts set forth in the complaint, and make a substantial allegation as to what the accounts altogether showed.

That it is alleged that such books were falsely and fraudulently made up by defendant, renders it the more proper to grant an inspection.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided December 3, 1883.

Appeal by plaintiff from an order granting to the defendant an inspection of certain books and papers in the possession of plaintiff, for the purpose of properly drawing the answer. The books, papers, etc., of which an inspection was desired, were the following:—the journal and ledger kept by defendant as superintendent of plaintiff; a certain balance sheet taken therefrom; and certain vouchers in support thereof.

Further facts appear in the opinion.

Easton & Jennings, for appellant.—The order sought is not a matter of right, but a privilege, which will only be granted in an extreme case, where the refusal would involve the loss of a claim or defense (*Harbison v. Van Valkenburgh*, 5 Hun, 454; *Stanton v. The Delaware M. Ins. Co.*, 2 Sandf. 662; *M. E. Ins. Co. v. N. Y. L. & Imp. Co.*, 55 How. Pr. 351; *Strong v. Strong*, 1 Abb. N. S. 233; *Gelston v. Marshall*, 6 How. Pr. 398), and must in all cases be brought within the requirements of General Rule 14 (*Code Civ. Pro.* § 804).

The action being to recover damages for conversion, the only answer necessary for the defendant to interpose under which his defense will be fully preserved, and under which he could offer evidence tending to explain the plaintiff's claim, would be a denial that he had converted the funds.

Respondent's Points.

of the plaintiff (Gelston v. Marshall, *supra*; Mora v. McCredy, 2 Bosw. 669).

The application should never be granted when the books and papers can be reached by subpoena, *duces tecum* (Van Zandt v. Cobb, 12 How. Pr. 544; Commercial Bank of Albany v. Dunham, 13 Ib. 541; Brevost v. Warner, 8 Ib. 321; Iron Co. v. Loan Co., 55 Ib. 351), and § 868 of the Code of Civil Procedure has made provision for the production of books, &c., of a corporation by subpoena, *duces tecum* (Central Cross-Town R. R. v. 23d St. R. R. Co., 4 Week. Dig. 324).

It is not enough that the books sought may contain facts or evidence. The petition must show that papers, &c., sought are absolutely necessary in protecting the defendant's right by answer (Stanton v. Delaware Ins. Co., 2 Sandf. 662; Campbell v. Hodge, 2 Hun, 308; Walker v. Granite Bank, 19 Abb. 111; Brownell v. Nat. Bk. Gloversville, 10 Week. Dig. 17). The papers sought must contain the facts, not information from which they may be obtained, and the petition must so state (Brooklyn Life Ins. Co. v. Pierce, 7 Hun, 236; Morrison v. Sturgin, 26 How. Pr. 177; McCallister v. Pond, 15 Ib. 299; Thompson v. E. R. R. Co., 9 Abb. N. S. 212; Marquette v. Note Company, 7 Robt. 77; N. E. Iron Co. v. N. Y. L. & Imp. Co., 55 How. Pr. 351; Davis v. Dunham, 13 Id. 425). Fishing expeditions will not be permitted (Strong v. Strong, 1 Abb. N. S. 239).

The practice of allowing discovery is not favored (Houseman v. Sterling, 61 Barb. 347; De Bary v. Stanley, 5 Daly, 412). The courts look upon applications with suspicion (Jockling v. Brown, 3 E. D. S. 539).

Frank E. Blackwell, for respondent.—Although this is technically an action for a conversion, the proper determination of it requires the examination of a long account. On this ground it is distinguishable from the case of Mora v. McCredy (2 Bosw. 670).

Where there is reason to believe that evidence material

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to the issue exists in documents, admitted by the other party to be in his possession, and no great practical inconvenience will follow from allowing a party to inspect them, a discovery will be allowed (*Lefferts v. Brampton*, 24 *How.* 257; *Union Paper Collar Co. v. Met. Collar Co.*, 3 *Daly*, 171; *Case v. Banta*, 9 *Bosw.* 595; *Ruberry v. Binns*, 5 *Id.* 585).

The books and documents in question belong equally to both parties. They are the private books of the superintendent delivered over to the general manager of the company for its information. Under such circumstances it was the uniform rule under the old practice to grant inspection (*Kelly v. Eckford*, 5 *Paige*, 548; *Case v. Banta*, 9 *Bosw.* 595; *Manley v. Bonnel*, 11 *Abb. N. C.* 124; *Ruberry v. Binns*, 5 *Bosw.* 685).

The Code purposely leaves a large discretion with the court in respect to the granting of this relief (§ 804). The only matters required to be established are the possession of the documents by the adverse party and the materiality of their contents (*Id.* § 803; *Stillwell v. Priest*, 85 *N. Y.* 649).

PER CURIAM.—The complaint alleged that the defendant was the superintendent of the plaintiff, and that it was his duty to receive property and moneys of the company, to pay certain expenses and to pay certain balances to the plaintiff; that on a day specified, the defendant reported that he had a balance in his hands belonging to the plaintiff of \$10,872; that after that date the defendant received certain other large sums specified in the complaint, for the plaintiff; that afterwards the plaintiff demanded from defendant a statement of the amounts received and disbursed by him, and in response to such demand the defendant delivered various vouchers, “by which it appeared that he had paid out and expended for this company” “the sum of \$19,770, and that there is still in his hands belonging to said company and unaccounted for the sum of \$50,468;” that the plaintiff demanded payment of this amount; that

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defendant has neglected and refused, and still neglects and refuses to pay the same or any part thereof, "but has converted the same to his own use." On the application it was shown that at the time the defendant delivered to the plaintiff the vouchers last referred to in the complaint, he also delivered certain books containing accounts made by him of his doings as superintendent. The plaintiff presented in his affidavit statement that these accounts were false.

The plaintiff claims that the action is for conversion of money received by defendant and therefore that the allegations of the complaint as to the vouchers, etc., are immaterial. If they were material, there is no reason for saying that the defendant should be deprived of the benefit of the face of accounts presented by him, on which the complaint is drawn against him. It does not seem just, when the plaintiff has used allegations as if they were material and proper to be answered, that he should take a different position when it is for his interest to do so, and which it will not by the face of the record, appear thereafter that he has taken.

To meet the allegation upon the appearance of some of the accounts, it was proper to allow the inspection of the accompanying accounts so that the defendant might make a substantial allegation in his answer as to what the accounts altogether showed.

It was charged that the accompanying accounts had been fraudulently and falsely made by the defendant. On this charge, it was the more proper, that the defendant should inspect them.

It is not meant, that if the action had been for conversion, and there were no immaterial allegations, that an inspection should have been ordered. The case is decided on its peculiarities and cannot be a precedent when such peculiarities do not exist.

Order affirmed, with \$10 costs.

Statement of the Case.

MATTHEW J. FOGARTY, RESPONDENT, v. HENRY J. CULLEN, JR., AS ADMINISTRATOR, ETC., APPELLANT.

Partnership—liability of representative of deceased partner for firm debts.

Upon the death of one of several partners, the survivors alone are liable at law for the debts of the firm, and the liability of the representative of the deceased partner is in equity, and is that of a surety, to be enforced by the creditor upon showing either that the survivors are insolvent in fact, or that he has exhausted his remedy at law against them.

Where the survivors form a new firm assuming the liabilities and taking the assets of the old firm, a specific agreement to accept the liability of the new firm to the exclusion of that of the representative of the deceased partner, must be proven by satisfactory evidence, and there is no presumption of law favoring it.

That the creditor looked to the survivors for payment and accepted interest from them, and asked them to pay part of his debt, and did not press them for payment till fourteen months after the death of the deceased partner, raises no presumption that he has agreed to release the representative of said decedent from his secondary liability.

Before SEDGWICK, Ch. J., FREEDMAN, and O'GORMAN, JJ.

Decided December 3, 1883.

Appeal by defendant from judgment in favor of plaintiff entered upon the report of a referee.

Action to recover against the representative of a deceased partner for services rendered to their firm, upon the allegation that the surviving partners are insolvent. The defense was a denial of the contract between plaintiff and the firm, and a claim that defendant's intestate was discharged from liability owing to an alleged agreement made with the survivors, whereby the money due plaintiff was contributed by him as capital to the co-partnership newly formed by said survivors.

The following facts were found by the referee: That from January 1, 1879, to December 10, 1880, the defendant intestate, Philip L. Freneau, with William A. Hawkins and Clarence Brainard, were co-partners and the firm was dissolved by the death of Mr. Freneau; that plaintiff was

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employed by said firm during said term, at a salary of \$3,000 per annum, payable monthly, and a commission of ten per cent. of the profits during each year; that ten per cent. of the profits for 1879, amounted to \$2,761.55, and for 1880, down to December 10, \$2,748.90; that the only payments made on account of these commissions were \$161.09 and \$139.38; that the defendant was the administrator of Mr. Freneau; and that the surviving partners were insolvent.

Further facts appear in the opinion of the referee, which was as follows:

EDWARD M. SHEPARD, Referee.—After the death of Mr. Freneau, the two surviving members of the firm, Messrs. Hawkins & Brainerd alone were at law liable to the plaintiff (*Waydell v. Luer*, 3 *Den.* 410, per LOTT, S.). The plaintiff had merely an equitable recourse to the Freneau estate upon his showing either that the survivors were insolvent in fact, or that he had exhausted his legal remedy against them (*Lawrence v. Trustees*, 2 *Den.* 577; *Van Riper v. Poppenhausen*, 43 *N. Y.* 68; *Pope v. Cole*, 55 *N. Y.* 124). The Freneau estate was therefore a surety to the plaintiff for the payment of his debt by the survivors; and in this action the estate may avail itself by way of defense of any conduct on plaintiff's part which violated its rights or suspended its remedies as a surety (*Millerd v. Thorn*, 56 *N. Y.* 402; *Colgrove v. Tallman*, 67 *N. Y.* 95; *Dodd v. Dreyfus*, 17 *Hun*, 600; *Maier v. Canavan*, 8 *Daly*, 272; *Billborough v. Holmes*, *L. R.* 5 *Ch. D.* 255). If, therefore, the plaintiff agreed that the money due him from P. L. Freneau & Co. should be contributed as capital to the copartnership newly formed by Messrs. Hawkins & Brainerd for the term of the copartnership, so that he could no longer at any time demand the debt from them, the Freneau estate was discharged.

The defendant contends that such an agreement may be inferred from slight circumstances. He relies upon authorities, holding that where one partner has retired and the remaining partners (either with or without new partners),

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have as a new firm taken the assets and assumed the liabilities of the old firm, the court is very ready to find that a creditor of the old firm continuing to deal with the new firm has substituted its liability for the liability of the old firm. These authorities, however, are not directly in point. The defense here is not that the plaintiff took Hawkins & Brainerd as his sole debtors, but the very different, though doubtless equally valid defense, that he contributed the debt due him to the new firm as capital at the risk of the new business. There seems to be no sound reason for not requiring abundant proof of such an agreement. If it were made, it radically changed the relations of the parties. It was an agreement of a kind likely to be definitely and expressly made, rather than to arise (as the substitution as debtors of a new firm, for the old firm it succeeds, oftentimes arises), out of many events of business intercourse, which although separately not considered with care, have still gradually led to and exhibited a plain understanding and intention on both sides (*Harris v. Farwell*, 15 *Beavan*, 31, 35).

The defendant's authorities are beside applicable chiefly to the case of a retiring and not of a deceased partner. It is true in the case of the remaining partners taking the firm assets and assuming the firm debts, and the creditor being advised of the change, that, not only a retiring partner, but also the estate of a deceased partner, has certain privileges of suretyship. But there is the important distinction, that until some new agreement is made, the retiring partner and the remaining partners are together jointly liable for the debt; while after the death of one partner, the survivors alone are jointly liable for the debt. If there were originally three partners, after the retirement of one, the creditor still has three debtors jointly held to him, and the joint property of those three is the primary fund for his payment. But after the death of one of the partners the creditor has only two debtors; and to them and to their joint property he is bound in the first instance to look. In the case of the retiring partner, inasmuch as he

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is still directly and primarily liable to the firm creditor, any exclusive dealing of the creditor with the remaining partners and exclusive recognition of them as his debtors, being a course of conduct inconsistent with an intention to hold all of the original debtors, may come to import an intention and agreement to take the joint liability of the remaining partners in lieu of the joint liability of the retired and remaining partners together. As has been clearly pointed out, the joint liability of the remaining partners may be a far better security than the joint liability of the retiring and remaining partners (*Waydell v. Lner, supra*, per LOTT, S. 410).

Even this rule, however, is very carefully guarded. Although slight evidence may be sufficient to establish the novation, the agreement must be plainly brought home to the creditor, whose rights and security cannot be changed except with his consent. Receipt of interest by the creditor from the remaining partners, his proof of his claim against the new firm as for money had and received to his use, and his entering into an arbitration of the claim with the remaining partner, have been held insufficient to discharge the retiring partner (*Harris v. Farwell*, 15 *Beav.* 31; *Kirwan v. Kirwan*, 2 *C. & M.* 617; *Blew v. Wyatt*, 5 *Car. & P.* 397; *Gough v. Davies*, 4 *Price*, 200; *Oakford v. European, &c. Co.*, 1 *Hem. & M.* 182; *Harris v. Lindsay*, 4 *Wash. C. C.* 271). *Blew v. Wyatt*, was the case of a clerk remaining in the employ of several successive firms and fully aware of the changes. He was permitted to recover against the original partners. Lord LYNDHURST observing "that mere knowledge of the changes will not be sufficient; there must be some agreement shown between the parties."

The creditor may, indeed, gain the credit of the new firm without losing the security of the old firm. The agreement of the new firm with the old firm may be a consideration enuring to the benefit of the creditor, though he remain passive and surrender nothing (*Harris v. Farwell*, 15 *Beav.* 31; 1 *Lindley Partnership*, [4th Ed.] 449).

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But in the case of the deceased partner, any such exclusive dealing of the creditor with the survivors, and recognition of them as his debtors, does not prove a release by him of his possible future claim in equity against the estate of the deceased partner. For the creditor was bound to so recognize the survivors, and in the first instance exclusively look to them, for the plain reason that they were his sole debtors at law and his primary debtors in equity. As to the joint property of the survivors, he stood, without any agreement, upon the same basis as their new creditors (*Ex parte* Kendall, 17 Ves. 514). In this state, where the modern English rule is not followed, he could not, in the first instance, even in equity, join the representatives of the estate of the deceased partner with the surviving partners (*Voorhis v. Childs' Executor*, 17 N. Y. 354; *Wilkeson v. Henderson*, 1 Mylne & K. 582). He must first exhaust his remedy against the survivors or show their insolvency. When, therefore, the creditor treats the survivors as his debtors, receives interest or partial payment from them, sues them, delays for years demanding money of them, proves his debt against them and receives dividends in bankruptcy, he has been held not to release his right to an equitable recourse against the estate of the deceased partner (*Winter v. Innes*, 4 Mylne & C. 101; *Sleece's Case* [*Devaynes v. Noble*], 1 Meriv. 527, 540; *Daniel v. Cross*, 3 Ves. 277). In *Sleece's case*, the Master of the Rolls said (p. 569).: "*Ex hypothesi*, the surviving partners are liable to the payment of this debt, and ought in the first instance, to be called upon for the payment of it. How is it then that a creditor, by acting upon that acknowledged liability to the extent that his convenience and occasions may happen to require, is *quoad* the residue of his debt to be placed in a worse situation than he would have *quoad* the whole if he had demanded no part of it? Miss Sleave, by drawing a draft upon the surviving partners, recognizes them as her debtors. Such undoubtedly they were; but how does that affirmative act prove negatively that thenceforth no other persons were to be her debtors?" In *Hamersley v. Lambert* (2

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Johns. Ch. 508), Chancellor KENT held the doctrine to be fully established "that neither delay nor lapse of time, nor dealing with the survivor, nor calling for and receiving part of the debt from the survivor amounts to a waiver or bar of the claim upon the assets of the deceased."

In my opinion, therefore, the fact that the plaintiff evidently looked to Messrs. Hawkins and Brainerd for payment and accepted interest from them, and asked them to pay him part of his debt, and did not press them for payment for fourteen months after the death of Mr. Freneau, raises no presumption that he had agreed to release the defendant's secondary liability to him, which he may well not have had in mind at all. On the contrary, it was conduct perfectly consistent with his having a primary claim against Messrs. Hawkins & Brainerd and a secondary claim against the Freneau estate as surety.

The case must, therefore, depend upon the interview between Hawkins and Brainerd and the plaintiff in March, 1831. The witnesses differ materially in their recollections of the conversation at that interview. Hawkins and Brainerd say that they then agreed with the plaintiff to employ him at a salary of \$3,000 a year and ten per cent. of the profits, and that in consideration of that employment he agreed to leave in the business as capital at its risk the money due him upon which he was to receive 6 per cent. interest. The plaintiff admits the employment, but denies that any agreement was made to leave his money. It would certainly be at best unsatisfactory to find an agreement constituting plaintiff a partner from conflicting recollections of a single conversation unsupported by other circumstances. Testimony as to conversations, though given by the most honest and careful witnesses, cannot, through the imperfections of memory and the blending of subsequent events and ideas with earlier and separate transactions, rank very high as evidence (*Law v. Merrills*, 6 *Wend.* 268; 1 *Greenleaf's Ev.* [13th Ed.] note to § 200; *Learned v. Tillotson*, per SEDGWICK, Ch. J., at the special term of the superior court).

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If conceded facts and the behavior of the parties make one or the other version of a conversation the more probable, that version ought ordinarily to be adopted.

It is admitted that plaintiff was offered a partnership and declined the offer. It is plain that neither party at the interview of March, 1881, supposed that the plaintiff had become a partner. The plaintiff was to receive as compensation \$3,000 and 10 per cent. of the profits,—precisely what he had in Mr. Freneau's lifetime. His services were presumably no less valuable and necessary to the new than to the old firm. It is not claimed that he was to have any share of the profits for his money beyond 6 per cent. interest upon it. But he had had 6 per cent. interest upon the money in Mr. Freneau's lifetime, and would, as matter of course, continue to receive the same interest so long as the principal remained unpaid; and I cannot think that the plaintiff put his money at a different and far greater risk than it had been, without receiving some additional advantage. When the plaintiff asked Mr. Hawkins, in August, 1881, for some of the principal sum, both acted as if the plaintiff made a claim, which it was simply inconvenient for Mr. Hawkins to meet, and not as if the plaintiff made a claim in violation of the agreement between them. I do not doubt that Messrs. Hawkins & Brainerd, in or about March, 1881, found from the plaintiff that he did not then require his money. I do not doubt that the plaintiff's relations to Messrs. Hawkins & Brainerd disinclined him to insist upon the payment of his money. But I cannot find upon the evidence, that the plaintiff made any agreement which would debar him from demanding and at law recovering the money from Messrs. Hawkins & Brainerd. The estate of the deceased partner as surety has not therefore any valid ground of complaint of the plaintiff's dealings with the surviving partners.

It is conceded that the apparent amounts of the plaintiff's ten per cent. of the profits of the original firm of P. L. Freneau & Co. were \$2,761.55 for 1879, and \$2,748.90 for 1880; and that those amounts were credited to him as

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shown by the books of that firm. The defendant insists that these were not actual but estimated profits; and that the actual profits were about 65 per cent. of the amount of the apparent profits. I think the burden was upon the defendant to establish, if it could be done, what deduction should be made from the profits as shown by the books of Mr. Freneau's firm.

The payment of \$139.38 on February 6, 1882, was, I think, plainly intended as a payment upon the debt of the old firm. It was that debt which was discussed between the plaintiff and Mr. Hawkins at the time of that payment. That sum will therefore be deducted from the plaintiff's recovery.

There is, perhaps, some ground for plaintiff's contention that because in equity costs are in the discretion of the court, they should even in an action against an administrator be directly allowed or disallowed by a referee who is to hear and determine all the issues. I do not, however, find that a distinction in this respect between equitable and common law actions against an administrator or executor has ever been clearly established; and there are a number of cases which in general terms state it to be the duty of the referee to simply certify the facts, leaving the award or refusal of cost to the court. I have therefore deemed it the wiser course not to decide the question of costs, but to include in the findings such a certificate.

Butler, Stillman & Hubbard, and A. H. Joline, for appellant.—Where an old firm has been dissolved and a new firm has agreed to assume its liabilities, but slight circumstances are required to justify finding an intention on the part of a creditor of the old firm, who had notice of the dissolution and of the agreement by the new firm to accept the liability of the old firm in place of the liability of the old (Regester v. Dodge, 61 How. Pr. 107; *Ex parte Williams*, Buck. 13; *In re Smith, Knight & Co.*, L. R. 4 Ch. App. 66; *In re Family Endowment Soc.*, L. R. 5 Ch. App. 118; *Bank of Australasia v. Flower*, 1 L. R. [P. C.] 27).

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A creditor who assents to a transfer of his debt from an old firm to a new firm and goes on dealing with the latter for some time, making no demand for payment against the old firm, may not unfairly be inferred to have discharged the firm, "and if the question arises in equity, upon an attempt to have recourse to the estate of a deceased partner, the court will consider all the circumstances of the case and decline to assist the creditor if, upon the whole, justice to all parties so requires" (*Collyer Partn.* § 570 [note p. 557, 2d Am. Ed.]; *Ex parte Kendal*, 17 *Vesey*, 522, 525; *Oakley v. Pusheller*, 4 *Cl. & Fin.* 207; *Brown v. Gordon*, 16 *Beav.* 302; 1 *Lindsley Partn.* 366, 367). The *dictum* of Chancellor KENT in *Hamersley v. Lambert* (2 *Johns. Ch.* 508), is not in accordance with the later decisions, and is not authorized in its extent by either cases or principles (*Fisher v. Tucker*, 1 *McCord's Ch.* 173; *Collyer Partn.* § 600, note).

The referee's distinctions, (1) that the defense in this case was "not that plaintiff took Hawkins and Brainerd as his sole debtors," and (2) that the case was not that of a retiring partner, but of a deceased partner, are not substantial. (1.) The defense in the case was that the plaintiff took Hawkins and Brainerd as his sole debtors. There was a novation—a substitution of a new obligation for an old one. (2) "The same acts of the creditor which operate in discharge of the retiring partner will be equally effectual in favor of the deceased partner's estate" (*Collyer Partn.* § 595).

Bagley & Thain, for respondent.

PER CURIAM.—The principal question in the case, is whether the referee erred in certain findings of fact. The result of the examination of the evidence is, that the court does not come to different conclusions from those reached by the referee. The exceptions to the admission of testimony are not sustained. The opinion of the referee discusses satisfactorily the law and the facts of the case.

Judgment affirmed, with costs.

Plaintiff's points.

DENNIS HINCHY v. THE MANHATTAN
RAILWAY CO.*Damages—when too remote.*

The complaint alleged that defendant negligently allowed sparks of fire to escape from one of its locomotives, which sparks entered plaintiff's house, setting fire to his curtains, furniture, etc., and that in his efforts to extinguish the fire, plaintiff's hand was burnt without any negligence on his part, etc.,—*Held*, that upon the complaint, as framed, there could be no recovery for the personal injury, the damage being too remote.

Before SEDGWICK, Ch. J., and O'GORMAN, J.

Decided December 3, 1883.

Exceptions taken by plaintiff heard in the first instance at general term. The complaint alleged, that while a train of cars and a locomotive belonging to defendant were passing, "the defendant carelessly and negligently allowed sparks of fire to escape from its said locomotive, which sparks entered the dwelling-house occupied by the plaintiff, thereby setting fire to the curtains, furniture and property of the plaintiff; that in his efforts to extinguish said fire the plaintiff's left hand without any negligence on his part was severely burned, and the plaintiff thereby suffered, and still suffers, etc." The complaint contained no demand of damages to property and on the trial, counsel for plaintiff, in opening the case, stated that no claim was made for damage to property, it having been insured; that the case was founded upon the injury to plaintiff's hand sustained in the course of his endeavor to extinguish the fire communicated to the property.

The counsel for defendant then moved to dismiss the complaint, on the ground that the damage was too remote. The motion was granted, and the plaintiff's exception to this ruling was directed to be heard, in first instance at general term.

Smith, Allen & Smith, for plaintiff.—The complaint states facts sufficient to constitute a cause of action (Rex-

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ter v. Starin, 73 *N. Y.* 601). It was not the necessary result of plaintiff's efforts to extinguish the fire that his hand should be burned. As in *Rexter v. Starin*, "it was for the jury to determine whether the act of plaintiff was a prudent and proper one." There is nothing in *Eckert v. L. I. R. R. Co.* (43 *N. Y.* 502), in conflict with these views.

The damages were not too remote. It was the defendant's negligence that put the plaintiff in a position in which he was forced to make so perilous a choice, and the defendant is liable for the consequences (*Coulter v. Am. M. Un. Express Co.*, 5 *Lans.* 68; *Buel v. New York Cent. R. R. Co.*, 31 *N. Y.* 319). If the plaintiff was injured by acting precipitately and under excitement, which precipitation and excitement were caused by the negligent act of the defendant, he can recover (*Vanderburgh v. Truax* 4 *Den.* 464; *Scott v. Sheperd*, 1 *Smith's L. C.* 5th [Am. Ed.] 549).

It was plaintiff's duty to act as he did. If the plaintiff had made no efforts to extinguish the fire and to prevent damage therefrom, and was in a position so to do, he could not have recovered damage for the destruction of his property (*Wharton Neg.* § 877; *Ill. Cen. R. R. Co. v. McClelland*, 42 *Ill.* 355; *Ward v. St. P. R. R.*, 29 *Wis.* 144).

Deyo, Duer, & Bauerdorf, for defendant.—For a person engaged in his ordinary affairs or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence which will preclude a recovery for an injury so received. But when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent, unless such is to be regarded either rash or reckless (*Eckert v. L. I. R. R. Co.*, 43 *N. Y.* 402). *Rexter v. Starin* (73 *N. Y.* 502) is not in conflict with the *Eckert* case. Plaintiff's injury was due to his voluntary act, and that the negligence was not the *causa causans* of the injury to his hands, and consequently is too remote to enable him to recover, see *Ryan v. N. Y. Central*, 35 *N. Y.*

Opinion, per Curiam.

210 ; *Tonawanda R. R. Co. v. Munger*, 5 *Den.* 255 ; *People v. Mayor, etc.*, 5 *Lans.* 524.

PER CURIAM.—The ancient rule that the allegations of a pleading are to be taken as stating the most favorable possible case for the pleader, and therefore that a fact, necessary to the cause of action, is not to be considered as existing if it be not alleged, must be applied in the present case. There being essential omissions, no liberality in construing what appears, would cure the defect. The plaintiff alleges, “that in his efforts to extinguish said fire the plaintiff’s left hand, without any negligence on his part was severely burned.” There is no allegation that at the time he made the effort to extinguish the fire, the fire was spreading to other property than that actually burned, or that there was an appearance of the fire endangering life or other property, or that the effort was made for the purpose of preventing the fire imperiling life or other property or causing further damage. From the pleading it is to be understood, that the facts of the case would not justify such allegation. It is to be taken that the fire was of a kind that did not threaten injury to person or further damage, and that the evidence would so show. In the latter case the party guilty of the negligence is not deemed to be responsible because the negligent act, it is deemed was not the proximate cause of the effort to extinguish.

The allegation that the effort to extinguish was without negligence on his part does not increase the scope of the pleading, for this averment being equivalent to alleging that the defendant’s negligence was the sole cause of the damage, avails nothing, unless beyond it the pleading adequately states that the negligence was the cause of the damage.

For these reasons the complaint was properly dismissed.

Plaintiff’s exceptions overruled, defendant to enter judgment with costs.

Statement of the Case.

THE MAYOR, &c., OF N. Y., RESPONDENT, v. THOMAS COOPER, APPELLANT.

Contract for sale of dock property—construction of terms of sale—repairs to be made in discretion of commissioners.

C. purchased of the Mayor, &c., of the City of New York, the right to use for a term of years a certain pier for wharfage purposes, etc., which sale was made expressly subject to the published terms of sale, applying also to rights in other dock property sold at the same time, and which contained the following provisions: "The Department will make, either prior to the commencement of the lease in each case, or as soon thereafter as practicable, such repairs to any of the above-named premises in the judgment of the commissioners needing them, as they may consider necessary to place the premises in suitable condition for service during the term for which leases are sold; but all the premises must be taken in the condition in which they may be on the date of commencement of lease, and no claim that the property is not in suitable condition at the commencement of the lease will be allowed by the Department No claim will be received or considered by the Department for loss of wharfage, or otherwise, consequent upon any delay in doing the work of repairing, or consequent upon the premises being occupied for repairing purposes."

In an action by the Mayor, &c., for rent falling due about a year thereafter, C. interposed a counter-claim for damages for failure to repair, etc., which the court refused to entertain, substantially, on the ground that there could be no recovery thereon, holding that evidence of the condition of the pier at the time of the commencement of the lease was immaterial.

Held, error that the above provisions in the terms of sale constituted a contract, under which the commissioners were bound to form a judgment, which need not be oral or quasi-judicial, as to whether the pier in question was in need of repairs; that whether or not, this judgment was formed could be shown by circumstantial evidence including the force of legal presumptions, and evidence that the pier was in a plainly dilapidated condition, was of this character and therefore admissible.

Further held, that the discretion of the commissioners as to the extent of the repairs to be made in each case was not absolute.

Further held, that the clauses providing that no claim that the property is not in suitable condition at the commencement of the lease, nor for loss on account of "any delay" in making repairs, will be allowed, do not prevent a recovery herein.

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Before SEDGWICK, Ch. J., FREEDMAN, and O'GORMAN, JJ.

Decided December 17, 1883.

Appeal by defendant, from judgment in favor of plaintiffs, on verdict for plaintiffs, directed by the court at trial term.

The complaint alleged that the plaintiffs sold to the defendant the right to go into possession and use for wharf purpose the pier No. 60, and to collect the wharfage of the pier for three years, for which the defendant promised to pay quarter-yearly \$687.50, and demanded judgment for one such amount that had not been paid. The sale was made in March, 1881, and the sum demanded was for the quarter from November 1, 1882, to February 1, 1883.

On the trial it was virtually admitted that the sum claimed in the complaint was due, but the defendant claimed that the plaintiffs had committed a breach of agreement on their part for which the defendant was entitled to recover damages in the sum of \$2,000, by way of counter claim. The facts as to this were as follows: The purchase by defendant was expressly made subject to the terms and conditions set forth in the published notice of sale. This notice was for a sale of rights as to several piers. The sale was made by the Commissioner of Docks. The terms and conditions of the sale were, "The department will make, either prior to the commencement of the term of the lease, in each case, or as soon thereafter as practicable, such repairs to any of the above named premises, in the judgment of the commissioners needing them, as they may consider necessary to place the premises in suitable condition for service during the terms, for which leases are to be sold; but all the premises must be taken in the condition, in which they may be on the date of said terms respectively: and no claim that the property is not in suitable condition, at the commencement of the lease, will be allowed by the departments, and all repairs and rebuilding required and necessary to the premises during its term of lease, are to be done at the expense and cost of the lessee.

Appellant's Points.

"No claim will be received ~~or~~ considered by the department for loss of wharfage, or otherwise, ~~consequent~~ upon any delay, in doing the work of repairing . . . ~~or~~ consequent upon the premises being occupied for repairing purposes."

The defendant asked several questions as to the condition of the pier at the beginning of the term, as to its being dilapidated at that time, and unfit for the use contemplated, and as to its being in a suitable condition for service. These questions upon plaintiff's objection, were held to be irrelevant and immaterial, on the ground that it was immaterial what the condition of the pier was at the beginning; that there was no absolute covenant to repair; that it would be, under the counter-claim, necessary to show that in the judgment of the commissioners, the premises were out of repair; and that a clause expressly provided that no claim should be made because of delay. The substance of the objection was, that, under no circumstances, could there be a recovery under the counter-claim. Exceptions were duly taken by the defendant. The defendant further offered to show the amount of loss sustained from the pier not being repaired. This was overruled under objection.

The court thereupon directed a verdict for the plaintiffs in the amount claimed by them.

James M. Fisk, for appellant.—It was error to hold as matter of law, that defendant could not recover because of the agreement that no claim for damages by reason of delay should be made. The grant being one made by a municipal corporation for valuable considerations received, is to be construed strictly against the grantor. For principle by which such grants are to be construed, see *Langdon v. The Mayor* (93 N. Y. 129).

Considering the clauses in the terms of sale, what is the meaning of the same? First, there is the absolute promise on the part of the plaintiff, that "the Department will make such repairs."

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This is an absolute representation to intending purchasers, that for the consideration of the rent to be paid, the wharfs will be put in such a condition as will enable the purchasers to use them. If any other construction prevails, there is no mutuality of contract; the grantee is bound to pay rent, but the grantor is free to do as he pleases. The clause, to the effect that "no claim that the property is not in suitable condition at the commencement of the lease will be allowed by the Department," evidently means any claim for a reduction of rent, not for damages. There is nothing in the clauses which prevents the defendant from asking a court of law from considering or allowing it.

Again, it might be naturally construed as meaning that no claim will be considered or allowed in consequence of delay in repairing after the work of repairing had actually begun.

The defendant having taken the agreement prepared by another, and having upon its faith parted with value, should have a construction given to the instrument favorable to himself, and when the instrument is susceptible of two constructions, the one working injustice and the other consistent with the right of the case—that one should be favored which upholds the right (*Noonan v. Bradley*, 9 Wall. [U. S.] 395–407; *Barney v. Newcomb*, 9 Cush. [Mass.] 46). The intent exempting a party from liability must be plainly and distinctly expressed so that it cannot be misunderstood, it cannot be inferred from general words in the contract (*Nicholas v. N. Y. C. H. R. R. Co.*, 89 N. Y. 370).

George P. Andrews, corporation attorney, and *E. Henry Lacombe*, for respondents.

BY THE COURT.—SEDGWICK, Ch. J.—The terms of sale were made in general phrases, to be applied to the cases of several piers, in different states of needing or not needing repairs. They constituted a contract, virtually upon condition. The department agreed to make repairs to any of

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the premises, if it was the judgment of the commissioners that the premises needed the repairs. Again, if the commissioners considered that a certain amount or kind of repairs was necessary to place the premises in suitable condition for service during the term, then, in such case, the department agreed to make that amount or kind of repairs. The terms should not be so construed, unless there is no escape therefrom, as to lead to the conclusion that there was no contract of any kind. The fact that the parties used the promissory terms at all implies that they meant them to have some purpose. At the very least, a proper construction will not enlarge the ordinary meaning of words used, or supply new words, when the effect would be to declare that no contract was made, while with the words actually used according to their ordinary meaning, there would be a contract. Such a rule is implied in the decision of *Danolds v. State* (89 *N. Y.* 36), while in cases that involve the same fundamental principle, general phrases may be restrained (*Nicholas v. N. Y. C. & H. R. R. Co.*, 89 *Id.* 370).

We inquire then, what does the first condition mean? If the ordinary meaning be taken, if no words are supplied, it does not say or intend, that there shall be an oral or quasi judicial declaration of what is the judgment of the commissioners as to this pier needing repairs or that pier not needing them, for instance a resolution. If the commissioners proceeded to repair a pier, it would be competent to order the repairs, without explicitly declaring that the repairs were needed, although they might not be authorized to do it, if the fact were that repairs were not needed. And in this particular contract, the judgment of the commissioners was to be applied only to the perception of which of the piers, included in the terms of sale needed, or which did not need repairs. In the nature of things, the judgment would consist in seeing in what state the various piers were, whether some were unfit for use without repair and some were fit, and thus being conscious of what the facts were, it would be the action of the mind

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of the individual commissioners which would precede any action of the board that might order the repairs, when the pier was not in a fit state.

Undoubtedly, if the conditions according to its proper meaning could be shown by evidence to have been fulfilled, the contract should be enforced. This was within the range and possibility of proof. The construction of the contract does not require that the proof should be direct. It may be circumstantial, including the force of legal presumptions.

These circumstances were in the case: The commissioners, had knowledge of what should be the state of a pier. The law imposed certain duties in respect of that, and when they sold the piers, they were presumed to know the particular condition of each. Furthermore, I take it, they were bound by their contract to look at the pier, observe its condition, make a judgment as it is called, in respect of it, and a contract to do that is implied. To this case, the decision in *New England Iron Co. v. Gilbert Elevated R. R. Co.* (91 *N. Y.* 153) is applicable, the facts here being much stronger for the implication. Now, if the defendant had been allowed to prove that the pier was so dilapidated that the need of repairs was plainly apparent, there would have been sufficient to sustain a conclusion, if such were drawn, that as a matter of fact, the judgment of each commissioner was that this particular pier, was one that needed repairs.

Much that has been said is pertinent to the construction of what has been described as the second condition. By the first, a case might have been made out that the commissioners should make repairs. The second condition regulated their amount or kind. They were to be such as the commissioner should consider necessary to place the premises in suitable condition for service during the term of three years. The commissioners being bound to begin, the defendant was entitled to have such as the commissioners should think necessary. It was within the range of proof that certain repairs must in any event have been deemed

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necessary. There was a standard for that to a certain extent. It would be possible to show that up to a certain point, it was impossible that any one having skill and knowledge, should consider that repairs were not necessary. I suppose that the commissioners could not maintain the position, that the "consideration" referred to was such as a man might make in refraining to give his skill and attention to the matter, or by a perverted or unjust use of his faculties. In the present instance the commissioners not having proceeded to make any repairs, it would be impossible to show what kind of repairs they had in fact considered necessary. It was not necessary to show this. If the commissioners had begun to repair, as was their duty, the defendant would have had the advantage of such repair as the commissioners deemed necessary. An entire breach of the contract had deprived the defendants of this advantage. Although he would have to prove what kind of repairs he would have been entitled to, his right to do this is not destroyed by a supposition that the commissioners could have given no consideration to the matter. They were bound to give it, and indeed having ordered any repairs at all, would have been forced to give it. The contract is not susceptible of the construction that the commissioners might have, or would have had, the right to have not considered the matter at all.

Another clause, it was argued, prevented defendant's recovery under his counter-claim. This was "that no claim that the property is not in suitable condition at the commencement of the lease, will be allowed by the department." The defendant did not make such a claim in this action. The terms of sale permitted the department to refrain from making repairs before the term began, and the claim was that it was bound to make them as soon as practicable, after the term began. Proof of the condition of the pier at the beginning was relevant, as to what repairs, after the beginning would be considered necessary. Another remark as to this clause will be made in considering another clause, interposed against the defendant. It was

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that no claim will be received or considered by the department for loss of wharfage, or otherwise, consequent upon delay in doing the work of repairing.

Under the rule that has been already given, no words should be added to such provisions. And the words that no claim will be allowed or received or considered by the department will not extend to the making of the claim by action. The words "any delay in doing the work of repairing," will not comprehend the case of not doing the work at all.

Sustaining the objection that the fact of the pier being dilapidated was irrelevant and immaterial, prevented the defendants proceeding to prove other facts, and other questions which are in the case, especially as to the measure of damages, could not be raised on the trial or on this appeal. The decision now is confined to whether the defendant could have an action under the agreement and whether the evidence rejected was relevant.

I am of opinion that the judgment should be reversed and a new trial ordered, with costs of the appeal to abide the event.

FREEDMAN and O'GORMAN, JJ., concurred.

JOSEPH MARTIN, ET AL., v. THE TRADESMEN'S
INSURANCE CO.

*Conversion of policy of insurance on vessel.—Contract—alteration of.—
Damages.*

M. & K., as partners, obtained from defendant a policy of insurance on a certain vessel, which was made payable to the H. & H. Co., a mortgagee of said vessel, and delivered to said company, who, thereafter, and before the loss of said vessel, allowed an alteration to be made by defendant, the insurer, substituting for M. & K. one G. as the person for whose account the insurance was made, and making the surplus after satisfying the claim of the mortgagee payable to one B.

In an action brought after a total loss of the vessel, *Held*, a conversion of

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the paper with the words thereon constituting the contract, but not of the incorporeal and inchoate right of action; that plaintiffs were not bound to recover possession, or make use of the paper; that though no proofs of loss, etc., had been filed, a recovery could be had, as the damages arise from the tort which prevented plaintiff from suing on the policy.

The complaint alleged a partnership interest in the vessel, and the proof showed that whatever interest defendants possessed, if any, was individual. *Held*, that upon this ground, the complaint was properly dismissed, there being no proof of the value of such partnership interest.

Before SEDGWICK, Ch. J., and TRUAX, J.

Decided December 17, 1883.

Exceptions by plaintiff ordered to be heard in first instance at general term.

The action was for damages for the conversion of a policy of insurance.

The action was brought to recover damages alleged to have been sustained by the plaintiffs by reason of the wrongful and unlawful cancellation by the defendant of a policy of insurance issued by it upon the steamer *Adelaide*. The complaint alleges that the plaintiffs, as co-partners, held the legal title to the steamer, and were the equitable owners of two-thirds thereof; that on May 22, 1880, the defendant issued a policy whereby it insured the plaintiffs against loss upon the steamer to the amount of \$5,000, which sum, according to the terms of the policy, would in case of loss have been payable to the plaintiffs, subject to the amount due to the mortgagee of said steamer; that while said policy was in full force, and on June 18, 1880, the defendant wrongfully and unlawfully, and without the knowledge, consent, or approval of the plaintiffs, cancelled the said policy, as to plaintiff, and destroyed or converted the same, and thereby wrongfully deprived the plaintiffs of the benefit to which they were and would have become entitled upon the loss of said steamer which occurred June 19, 1880. Plaintiffs claimed damages to the amount of \$5,000. The policy of insurance was originally made payable to the Harlan & Hollingsworth Co. to the extent of their

Plaintiff's Points.

mortgagee interest. The cancellation was the striking out of the names of Martin & Kaskell, the plaintiffs, and substituting that of one Garvey, as the person for whose account the insurance was made, and by making balance, over and above the interest of the Harlan & Hollingsworth Co. payable to one Butler.

The complaint was dismissed at the close of the case, upon the ground that there was no proof that the plaintiffs sustained any damage by the alteration of the policy ; that if the alteration was made as alleged, it was immaterial.

Further facts appear in the opinion.

W. H. McDougall, for plaintiffs.—The policy was absolutely cancelled or destroyed by the defendant, and the act constituted a conversion of the policy for which the defendant is liable in this action (*Parsons Ins.* 138 ; *Forshaw v. Chabert*, 6 *Moore*, 386 ; *Campbell v. Christie*, 2 *Starkie*, *R.* 57). After doing all that it could possibly do to destroy the plaintiff's policy in a fraudulent manner, defendant cannot insist that the policy is still in force, and the plaintiffs should sue on it (*Cheses v. Frost*, 1 *N. H.* ; *Outhouse v. Outhouse*, 13 *Hun*, 130 ; *Murray v. Burling*, 10 *Johns*. 172). The only question in the case was whether the plaintiffs had an insurable interest in the steamer at the time the policy was made or cancelled, and it should have been submitted to the jury.

The destruction or cancellation of the policy, if only partial, gave the plaintiffs a right of action for conversion or damages (*Waterman Trespass*, 12).

The policy of insurance issued by the defendant and paid for by the plaintiffs, became the absolute property of the plaintiffs the moment it was signed by the proper officers (*Hallock v. Commercial Ins. Co.*, 2 *Dutcher's Rep. N. J.* 268 ; *Marshall Ins.* 210 ; *Whitaker v. Farmers' Union Ins. Co.*, 29 *Barb.* 312).

The policy of insurance was completely cancelled as to the plaintiffs (*Masters v. Miller*, 4 *T. R.* 32).

The measure of damages in this case, was *per se* the

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amount insured, the plaintiffs having shown that they had an insurable interest (*McLeod v. McGhie*, 2 *Scott's New Rep.* 604; *Outhouse v. Outhouse*, 13 *Hun*, 130; *Thayer v. Manley*, 73 *N. Y.* 305).

James K. Hill, Wing & Shoudy, for defendant.—The policy, according to the terms of the complaint, was made payable to the mortgagees to the extent of their interest, and it is not shown that the plaintiffs had any interest which would not be completely covered by the mortgage. If the defendant, as alleged, issued its policy upon the steamer in question, the plaintiffs' remedy was clearly upon that policy, after complying with its terms and filing proofs of loss.

Plaintiffs had given three several bills of sale of the boat, vesting the title thereto absolutely in one J. Garvey. The attempt by the plaintiffs to vary these bills of sale by parol evidence was wholly unavailing. It did not tend to show legal title in plaintiffs, and without title they had no standing in court.

BY THE COURT.—SEDGWICK, Ch. J.—There was evidence of a conversion of the policy. The mortgagees of the vessel received the policy from the defendant at the time it was made and retained it down to the trial. In the meantime, the words of the policy had been changed so as to destroy the contract in favor of Martin & Kaskell, that apparently existed in the first place. The jury would have had a right to find, that this had been done by the defendant with the co-operation of the mortgagees. This was a conversion against Martin & Kaskell. The thing converted was the paper with the words thereon that constituted the contract, and not the incorporeal and inchoate right of action, which cannot be converted. It is true that if the plaintiffs were in possession of the paper, they could under proper circumstances have recovered upon the contract as it was before alteration. After the act of conversion, they were not bound to recover possession or make any use of the paper. They could leave the defendants to the consequences of their wrong.

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It would be no objection to a recovery in this action, that as the plaintiffs had made no proof of loss, etc., and could not have recovered on the policy, therefore they were not damaged. The damages would flow from the fact that plaintiffs had been prevented from bringing an action upon the policy by the tort of the defendants.

For another reason, however, the plaintiffs had no interest in the policy that would sustain their recovering beyond a nominal sum.

At and before the policy was first issued, each of the plaintiffs had severally conveyed one half of the vessel, in separate bills of sale, to John Garvey. They were partners under the name of Martin & Kaskell, and the complaint alleges a copartnership interest as the foundation of the claim. As a copartnership they had no interest in the vessel beyond a right to use it in trade. The policy ran to Martin & Kaskell, the firm. It may be considered that under the agreement, intimated by the evidence, they were entitled to a bill of sale from Garvey of one third of the vessel each and that they severally had an insurable interest to such extent. This, however, does not alter the case in as much as the policy did not insure such interests, but a partnership interest. As there was no proof of what was the value of the partnership interest, the direction of the judge, dismissing the complaint should not be disturbed.

Plaintiffs' exceptions overruled and judgment on the direction below to be entered for defendant with costs.

TRUAX, J., concurred.

Respondent's Points.

MATTHEW WHITE, APPELLANT, v. JAMES RINTOUL,
RESPONDENT.

Statute of frauds.—Promise to pay debt of another.—Original undertaking.

Where one of two creditors of a certain firm holding the notes of said firm for its indebtedness, at the request of the other creditor, and to enable the latter to collect his claim, promises before the same are payable, to delay proceeding on said notes till a certain time after their maturity, in consideration of which the other creditor agrees to pay said notes at the date named, such agreement to pay said notes is an original undertaking and not within the statute of frauds, and is therefore enforceable, though not in writing.

Before SEDGWICK, Ch. J., FREEDMAN and O'GORMAN, JJ.

Decided December 17, 1883.

Appeal from judgment in favor of defendant entered upon the dismissal of plaintiff's complaint at the trial.

The facts appear in the opinion.

Robertsons, Harmon & Cuppia, for appellant.—The test by which to determine whether any given promise such as this, comes within, or falls without the statute, is this: Was the leading object of the promisor to subserve or promote some interest or purpose of his own, or was it his direct and leading object to become the surety or guarantor of another's debt? (*Mallory v. Gillette*, 21 N. Y. 412; *Nelson v. Boynton*, 3 Met. 396; *Leonard v. Vredenberg*, 8 John. 29; *Walker v. Taylor*, 6 Carr. & P. 752; *Emerson v. Slater*, 22 How. U. S. 28; 3 *Parsons Contr.* [5th Ed.] 24; *Prime v. Koehler*, 77 N. Y. 91).

Not merely the leading object, but the only object of the defendant, was to subserve and promote an interest and purpose of his own, viz., to secure protection to his interests as a creditor of the primary debtors, looking to their property to collect his claim.

Davenport & Leeds, for respondent.—The following cases sustain the judgment (*Roe v. Barker*, 82 N. Y. 431;

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Pfeifer v. Adler, 37 *Id.* 164; Duffy v. Wunsch, 42 *Id.* 243).

A promise to forbear suit for a limited period, as in this case, implies existence of the right to sue the principal debtor at the expiration of the period, and accordingly the continuance of the original debt and suretyship in the promisor. Where the promise creates suretyship, it must be in writing (*Brown v. Weber*, 38 *N. Y.* 187).

Forbearance to sue was never considered to belong to the class of considerations which were (but no longer are), supposed to take a case out of the statute (*Smith v. Ives*, 15 *Wend.* 182; *Watson v. Randall*, 20 *Id.* 201).

BY THE COURT.—FREEDMAN, J.—The complaint was dismissed exclusively upon the ground that plaintiff's counsel, in opening the case to the jury, admitted that the promise of the defendant alleged in the complaint and constituting the foundation of the cause of action, was not in writing, the trial judge thereupon holding that it came within the provisions of the statute of frauds as being a promise to answer for the debt of another. This therefore, constitutes the only question to be reviewed. Upon the facts set forth in the complaint no question as to the sufficiency of the consideration for the defendant's promise is presented; but the question is, whether, beside a good consideration, a writing was also necessary. The consideration and the writing are distinct and independent requisites to the validity of a promise within the statute, but really no question arises under the statute, until it is conceded or determined that there is a sufficient consideration. The sufficiency of the consideration is to be determined by the ordinary rules; but the necessity of a writing by the motive or object of the promisor, that is, whether the leading object of the promisor in making the promise was to subserve, or promote some interest or purpose of his own, or whether it was his direct and leading object to become the surety or guarantor of the debtor. For the purpose of determining the question involved, it must be presumed

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that the plaintiff would, if he had been allowed, proven the allegations of his complaint, and hence they must be taken as true. The material facts may therefore be stated to be as follows :

That on or about August 16, 1880, the plaintiff held two promissory notes duly made by the firm of Wheatcroft & Rintoul to his order, of which the first had about two weeks', and the second about six or seven weeks' to run yet ; and that at the same time the defendant was also a creditor of said firm to a considerable sum ; that at the request of defendant, and for the purpose of preventing an injury to defendant's interests as such creditor, looking to the property of said Wheatcroft & Rintoul to collect his claim, plaintiff, on or about August 16, 1880, agreed with defendant, and promised him not to institute any legal proceedings for the collection of either of said notes before July, 1881 ; that in consideration of such agreement and promise on plaintiff's part not to institute legal proceedings, and in order to secure protection to his said defendant's interests as such creditor as aforesaid, defendant on or about said August 16, 1880, undertook and agreed with, and promised to plaintiff that he, defendant, would pay plaintiff the amount of said two notes before said July, 1881 ; that plaintiff kept and observed his said agreement and promise not to institute legal proceedings, and plaintiff did not before said July 1. 1881, nor before this action, institute any legal proceedings to collect either of said notes ; that defendant did not keep and has not kept his said promise and agreement to pay said notes ; and that neither of said notes has been paid, etc.

From these facts, it appears that defendant's promise was not made for the benefit of the firm, nor in aid of their original contract, but for defendant's own benefit as a creditor ; that not merely the leading, but the sole object of the defendant in making the promise, was to promote and subserve an interest and purpose of his own ; and that the consideration, viz : plaintiff's forbearance, went directly to him, though the firm indirectly may also have had the

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benefit of it. The circumstances, therefore, bring the case at bar directly within the third class of cases enumerated in *Leonard v. Vredenburg* (8 *Johns.* 28), viz: where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm running between the newly contracting parties; also within the class of cases conceded by Comstock, Ch. J., in *Mallory v. Gillett* (21 *N. Y.* 412), to form an exception to the rule that the promise to pay the antecedent debt of another must be in writing; and finally within the rule as re-stated by the court of appeals in *Prime v. Koehler* (77 *N. Y.* 91). In all these cases the promise, though in form a promise to pay the debt of another, was treated as original, and not collateral, and for that reason it was held that the statute of frauds did not apply.

The cases cited by the respondent do not sustain the judgment. In *Roe v. Barker* (82 *N. Y.* 431), there was no absolute promise to pay. In *Pfeiffer v. Adler* (37 *N. Y.* 164), the consideration wholly failed. In *Duffy v. Wunsch* (42 *N. Y.* 243), the consideration did not enure to the promisor. *Brown v. Weber* (38 *N. Y.* 187), holds that where the promise creates suretyship, it must be in writing. *Smith v. Ives* (15 *Wend.* 182), and *Watson v. Randall* (20 *Wend.* 201), are two out of many cases which simply hold that forbearance to sue as a consideration enuring to the principal debtor alone, is not sufficient to take the case out of the statute.

The judgment should be reversed, and a new trial ordered with costs to abide the event.

SEDGWICK, Ch. J., and O'GORMAN, J., concurred.

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ERASTUS B. SEARLES, RESPONDENT, v. THE MANHATTAN ELEVATED R'Y CO., APPELLANT.

Negligence. — Cinders from engine on elevated railways. — Evidence.

Plaintiff, while passing under the elevated railway of defendant, was injured by a cinder, falling from an engine thereon, into his eye. The evidence showed that if the engine were in a perfect condition no fire could escape, also that cinders had frequently escaped before, falling into plaintiff's eyes. No explanation of the occurrence was made by defendant,—*Held*, that a verdict for plaintiff should be sustained.

Evidence that since the occurrence, cinders had not fallen to so great an extent as before, was admitted as tending to show that some contrivance could have been adopted to prevent the same from falling,—*Held*, not error.

The court refused to allow defendant to ask its master mechanic in cross-examination, whether the devices used by it to prevent the escape of sparks, were not the best known,—*Held*, not error; that the question as put, was not sufficiently specific, and the jury should have been informed as to what the devices actually were.

Before SEDGWICK, Ch. J., FREEDMAN and O'GORMAN, JJ.

Decided December 17, 1883.

Appeal by defendant from judgment in favor of plaintiff, on verdict of a jury, and from order denying motion for new trial.

The complaint alleged that while the plaintiff, in the course of his employment, was driving a car of the Third Avenue Railroad Co., near Fourteenth street, in the city of New York, on the second of January, 1880, a hot cinder from a locomotive of the defendants, then passing overhead, by reason of the negligence of the defendants, fell upon and was driven into the plaintiff's eye, inflicting serious injury, for which he claimed damages. There was evidence at the trial, that cinders had frequently fallen from the locomotives of the said elevated railroad before this accident, more than once falling into the plaintiff's eyes; that cinders cannot escape from the locomotive during regular business, or unless the ashpan were full, or unless an accident happen by reason of the grate coming down and letting the ashes

Appellant's Points.

come down into the pan ; that unless there is an accident, or something occurs to parts of the engine there is no place where fire can well escape ; and that assuming the engine to be in a perfect condition, there is no place from which fire can escape. No evidence to explain the cause of the falling of the cinders from their locomotive was offered on the part of the defendants. Plaintiff was allowed to testify that since the occurrence by which he was injured sparks had not fallen from the engines of defendants to the same extent as formerly, the trial judge holding that while it was not conclusive on the question of defendant's negligence, it might be some evidence to show that some contrivance could have been adopted at or before that time, which would have prevented the falling of cinders.

A motion was made, by counsel for the defendants, for dismissal of the complaint on the grounds that plaintiff was guilty of contributory negligence, and that no negligence on the part of the defendant had been proved. The motion was denied and the jury, after charge by the trial judge, rendered a verdict for the plaintiff of \$600. Exceptions were taken by counsel for the defendants to various rulings of the learned trial judge as to admission and rejection of evidence, and to his charge to the jury ; and a motion was made for a new trial on the judge's minutes, on the ground that the verdict was against the weight of evidence, and contrary to the evidence. This motion was denied.

Deyo, Duer & Bauerdorf, for appellant.—It was error to permit the plaintiff to testify that since the accident, cinders, etc., had not fallen so much as before that time (*Dale v. Delaware, etc. Co.*, 73 *N. Y.* 468 ; *Baird v. Daly*, 68 *Id.* 547 ; *Salters v. Delaware, etc. Co.*, 3 *Hun*, 339 ; *Payne v. Troy, etc., Co.*, 9 *Id.* 526 ; *Dougan v. Champlain, etc. Co.* 56 *N. Y.* 1 ; *Sewell v. Cohoes*, 11 *Hun*, 626).

It was error to exclude the question whether the devices to avoid throwing sparks, ashes or cinders which were in use upon the locomotives of the company at the time of

Opinion of the Court, by O'GORMAN, J.

the accident, were the best that were known (*Steinweg v. Erie Co.*, 43 *N. Y.* 123).

The court also erred in refusing to dismiss the complaint on the ground that the plaintiff was guilty of contributory negligence. His work took him every day where the danger was. He was aware of it to such an extent that he had used a shade to protect his eyes, and this device was adopted to his knowledge by other men similarly situated. It was not an irksome or unreasonable thing for him to do, and had he done it, probably would not have been hurt. It was conceded by the court that the plaintiff would be blamable in this respect "if the escape of cinders and sparks were a necessary incident to a careful operation of the elevated road, and had to be guarded against." It is respectfully submitted that this necessity clearly appears from the evidence, and commends itself to the experience of all, as inseparable from the operation of a railroad by the use of steam (*Field v. N. Y. Cent. Co.*, 32 *N. Y.* 339, p. 350; *McCaig v. Erie Co.*, 3 *Hun*, 599; *Collins v. N. Y. Cent. Co.*, 5 *Id.* 503).

Lewis J. Morrison, for respondent.

BY THE COURT.—O'GORMAN, J.—No error appears to have occurred in the trial of this action.

Construing the evidence in the light most favorable to the plaintiff, as the jury had a right to do, there was enough to sustain the inference that the accident occurred without negligence of the plaintiff, and by reason of negligence on the part of the defendants, in allowing some part of the machinery of their locomotive to be defective, thereby causing the injury to the plaintiff, and in the absence of any contradiction or explanation on the subject, on the part of the defendant, there was enough to warrant a verdict in favor of the plaintiff.

The learned trial judge correctly stated to the jury, the principles of law by which they should be governed, and left fairly to them for their consideration the questions of fact.

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The admission of evidence to the effect that cinders had been seen falling from defendant's locomotives since the accident, but not so much lately, under the careful qualification of the trial judge, was not error (*Dale v. Del. Lack. & W. R. R.*, 73 *N. Y.* 468). It was not followed up by any other testimony tending to give it weight and direction, and its effect, if any, must have been too slight to produce any influence on the jury.

The question put by defendant's counsel to the master mechanic of the defendants on cross-examination: "In your opinion, were the devices used upon your locomotives" (to avoid throwing sparks, ashes, or cinders from them), "in January, 1880, the best that were known"? was rightly excluded, as then put. The question was not sufficiently specific, and the jury should have been informed as to what devices were actually used by the defendant on its locomotives at the time of the accident, and thus enabled to judge for themselves as to the nature and efficacy of such devices, rather than depend on the general opinion of the witness.

Indeed, immediately after the question was excluded, the counsel for the defendant did in the regular way and without objection, make inquiry of the witness as to the kind and nature of the devices in use by the defendant, and did elicit the opinion of the witness thereon, so that no detriment could have occurred to the defendant by such exclusion.

The judgment of the court below should be affirmed with costs.

SEDGWICK, Ch. J., concurred.

Statement of the Case.

EDMUND T. H. GIBSON, ET AL., v. THE NATIONAL
PARK BANK OF N. Y.

Attachment—service of—what reached by levy—successive levies.—Banking—rights of bank after service of attachment, to pay check theretofore certified.—Notice of bad faith.—Authority—right to delegate.

Authority to do acts merely ministerial or mechanical may be delegated ; and, accordingly, the sheriff may delegate to an assistant the power to certify a copy of a warrant of attachment, and make a notice thereof, as required by the Code of Civil Procedure.

The Code of Procedure, unlike the new Code, makes no provision for successive levies under an attachment ; but under either Code the only property reached is that on hand at the time of the levy, which is perfected by service of the warrant and notice.

The certificate required in case there is property incapable of manual delivery, is of the property on hand when the levy is made, and it is no part of the levy and does not extend the effect of the service of the warrant and notice.

Where a bank certifies a check, and an attachment against the maker is thereafter served on the bank, its right to pay the check to any person subsequently presenting it depends on his being a *bona fide* holder for value (*Bills v. National Park Bank*, 89 N. Y. 343, followed). Whether, in the absence of suspicious circumstances the bank is authorized to consider any one presenting the check a *bona fide* holder for value ; or, whether it must in such case interplead the holder thereof, with the attachment creditor, *quære*.

The facts in this case considered and held, sufficient to show notice to the bank of absence of *bona fides*, etc.

Before SEDGWICK, Ch. J., FREEDMAN and O'GORMAN, JJ.

Decided December 17, 1883.

Cross-appeals from judgment entered upon a report of a referee.

The defendant appeals from the whole judgment. The plaintiffs appeal from that part of the judgment which denies them a portion of their claim.

The facts sufficiently appear in the referee's opinion as follows :

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HAMILTON COLE, Referee.—“This case was formerly tried under the name of *Bills v. National Park Bank*. The complaint was dismissed, and the judgment entered thereon was affirmed by the general term of this court (47 *Super. Ct.* 302). The court of appeals reversed this judgment and ordered a new trial (89 *N. Y.* 343). An assignment was made of the cause of action to the present plaintiff Gibson, and he has been substituted as a party herein.

“The evidence in the case, as it now stands, does not substantially differ from that given upon the former trial, and a full statement of the case is given in the opinion of the court of appeals.

“An objection, which lies at the foundation of the attachment proceedings is now first raised by the defendant. The copy of the warrant and notice which were served upon the bank in this case were signed by the names of the sheriff and his deputy, but their names were written by one Sweeney, a clerk employed in the sheriff's office. The defendant now claims that no proper service of the attachment in this case was ever made upon the bank, and that the papers which were served were of no force and effect, because they were not signed by the sheriff personally.

“It is settled that authority to do acts merely ministerial or mechanical may be delegated, but not so where the act involves the exercise of judgment or discretion (*Powell v. Tuttle*, 3 *N. Y.* 396 ; *People v. Davis*, 15 *Hun*, 209).

“The president, or the governor of a state, cannot delegate authority to sign a law. This requires the exercise of judgment. The judge issuing the attachment in this case could not delegate his power ; but the act of the sheriff, in certifying a copy of the warrant and in making the notice provided for by law, required the exercise of no judgment or discretion ; it was ministerial simply. It is true that a special statutory authority, under which a party may be deprived of title to his property, must be strictly followed ; but this does not mean that every step in the process, whether requiring the exercise of judgment or not, must be personally performed by those who are named to carry out

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the purposes of the act, unless it is expressly so provided. The initial step here is the warrant of attachment. The power to issue this cannot be delegated, but the power to certify a copy and make a notice, is within the general authority of the sheriff, is ministerial in its nature, and can as well be delegated as the power to serve them after they are made.

“Coming now to the merits: if the present case is brought directly under the decision of our highest court, nothing remains for the referee, save to follow that decision. It is claimed by the defendant that this decision depends upon the fact found upon the former trial, that at the time the securities were deposited by Rodney, the bank had reason to believe and did believe that the same were the property of the railroad company, and that such fact is not established by the evidence in this case. The plaintiffs insist that such fact is established, and, if not, that its existence is not essential to a recovery herein. It does not appear in the opinion of the court of appeals that the existence of such knowledge on the part of the bank is essential to the plaintiffs' recovery, and yet the existence of such fact is prominently put forward in the discussion of the case and decidedly colors the opinion.

“It is said in *Duncan v. Berlin* (60 N. Y. 151), ‘Where a balance due a depositor in a bank is levied on by virtue of an attachment against the depositor, the bank is not authorized to deduct an outstanding check given by the depositor to a third person, which had not, prior to the levy of the attachment, been presented and accepted.’ In the case at bar the check had been presented and accepted prior to the levy of the attachment. The court of appeals say that the issuance of this certified check did not pay the debt to the railroad company; that it was a negotiable security issued to the railroad company and payable to any *bona fide* holder who should present the same, yet that the debt evidenced by it was liable to be attached, so long as the negotiable security was in the hands of the attachment debtor, by serving the attachment upon the maker of the security,

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but that such attachment might be defeated by a subsequent transfer of the security to a *bona fide* taker for value, who is in a position to enforce it against the maker. Now it would seem from these principles, that where a bank had certified a check and an attachment against the maker of the check had been served upon the bank, that the right of the bank to pay the check to any person subsequently presenting the same would depend upon that person being a *bona fide* holder for value. The court do not consider the question as to whether, in the absence of any suspicious circumstances, the bank is authorized to consider any one presenting such a check a *bona fide* holder for value. That question did not arise in this case. If the ordinary rule be applied in favor of the bank as to the rights of holders of negotiable paper, that 'they are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to their diligence or negligence,' then the practical result would be that the bank could not be held in this case in the absence of such suspicious circumstances as should put it on its guard, and a disregard of which would justify the imputation of bad faith on its part.

"But it may be that the bank is in this position. It does not claim the fund deposited. It is indebted to the depositor to a certain amount for which it has certified a check. It is bound to pay this amount to the *bona fide* holder of the check. Before the check is presented for payment an attachment against the depositor is served upon the bank. This attachment reaches the debt due by the bank to the depositor, but the attachment is defeated if the check either before or after the service of the attachment has reached the hands of a *bona fide* holder for value. The check is presented for payment. The bank has notice that two persons claim the amount deposited—the attachment creditor and the holder of the check. The right of the latter to be paid depends upon his being a *bona fide* holder for value, and it may be that in all such cases the bank must interplead the two claimants, or else pay the check at the risk

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of being compelled to again pay the attaching creditor, if it be found that the person receiving payment was not in fact a *bona fide* holder for value of the check.

“Now what were the circumstances surrounding this transaction within the knowledge of the bank. Rodney was known to the officers of the bank as the assistant treasurer of the railroad company, and all previous transactions on his part with the bank had been on behalf of the railroad company. The check of \$6,600 had been drawn by Rodney as assistant treasurer, to the order of himself as assistant treasurer, had been presented by him to the bank for certification, had been certified, and by Rodney taken away from the bank April 27, 1875. The bank knew that the railroad company were anticipating an attachment. As early as November, 1874, a suit had been brought by one of the attorneys of the plaintiffs in this action and an attachment had been levied upon the railroad company's deposits in the defendant's possession. Therefore the president of the railroad company made an arrangement with the bank that it would allow the railroad company to overdraw its account in the early part of each month when its coupons fell due, and this arrangement had been carried on for several months. It had been acted upon in the early part of April, 1875. On April 27, 1875, there was a deposit to the credit of the railroad company of \$6,485.33. A check is certified drawn as before stated for \$6,600. On April 30 the attachment in this case is served upon the bank. On the next day, as it now appears, Rodney comes to the bank, is informed of the attachment served the day before, and then presents the certified check of April 27, together with some other securities belonging to the railroad company, opens an account in his own name and proceeds to draw checks upon the same for and on behalf of the railroad company, which are paid by the bank. Under such circumstances I cannot doubt but that the bank had reasonable cause to believe, and did believe, that the funds deposited were the property of the railroad company, and that the transaction took the shape it did

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to avoid expected attachments. The bank knew the facts. It was mistaken in supposing that an attachment against the railroad company could be avoided by the method adopted.

“On May 1, 1875, Rodney deposited, together with this certified check of \$6,600, other securities to a large amount belonging to the railroad company, and the question is now raised whether these additional amounts are reached by this attachment. In other words, does the attachment reach property belonging to the railroad company and acquired by the bank subsequently to the serving of the attachment upon it? There is a dearth of authority upon this point. In *Patterson v. Perry*, 10 *Abb. Pr.* 82, it is stated that only property on hand at the time of the service of the notice is affected, and this, I think is clearly so from the provisions of the Code itself. The provisions of the old Code govern this case. Section 235 provides for the execution of the warrant where the property levied on is incapable of manual delivery: “The execution of the attachment upon such property shall be made by leaving a certified copy of the warrant of attachment. . . . with a notice showing the property levied on.” What kind of notice is required has been the subject of much discussion; but, whatever notice is necessary, it can only speak at the time of its service. The Code assumes the immediate taking into possession by the sheriff of certain kinds of property, and the immediate obtaining of a certificate in certain other cases. In neither case could this be done except as to property then in possession. The attachment clearly, I think, speaks from the time of its service, and has no effect as to property absolutely acquired. The old Code provides that the warrant shall require the sheriff “to attach and safely keep all the property of such defendant within his county.” The new Code adds, “or which he may have at any time before final judgment.”

“The old Code made no provision for successive levies. The new Code provides that the sheriff “may levy from time to time, and as often as is necessary, &c.”

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“Under either Code that property only is reached by the attachment which is on hand at the time of the levy. The levy is perfected by the service of the warrant and notice. The certificate required in case of property incapable of manual delivery, is a certificate of the property on hand when the levy is made. It forms no part of the levy itself, and in no way operates to extend the effect of the service of the warrant and notice.*

“The plaintiffs are entitled to judgment against the Park Bank for the amount due by it to the railroad company on April 30, 1875, when the attachment in this case was served.”

Holmes & Adams, for plaintiffs.—I. The additional securities deposited with the certified check of \$6,600 on May 1, 1875, were subject to the attachment, being the property of the railway company. Attachments all have their origin in the custom of London (*Drake Attachments*, § 1). Our statutes attempting to make no definition of the words, “the sheriff shall attach,” “property shall be liable to be attached in actions at law,” we must look for the meaning in the law from which the proceeding was derived, and which the legislature had in view when it used the words.

“If the property of defendant below be found to have come into the hands of the garnishee before plea pleaded (*i. e.*, pleaded by garnishee), it is liable to be attached by the custom.” This means, from the context and from the facts of that case, if goods come to garnishee after attachment served, and before garnishee has pleaded to the warrant, the attachment so served shall bind them (1 *Com. Dig. Attachment*, C. P. 541; *Privilegia Londini* [Bohun], to be found in appendix to *Sargeant Attachment*, 205; *McDaniel v. Hughes*, 3 *East*, 874; *McGrath v. Hardy*, 4 *Bing N. C.* 785. Our practice requires the garnishee to give the sheriff a certificate stating the property, etc. This is nothing but the old garnishee's plea in another form; it

* The certificate in this case was not served until May 8, 1875.—*Reporters*.

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was clearly intended to take its place, and to be effectual for some purpose. It gives the garnishee opportunity to look about him and determine as to the rights of parties, and purports, in its terms, to state the facts, not of the time the attachment was served, but of the time since then, and up to the time when the certificate is made and delivered.

A consideration of the various attachment laws of this state, from act of 1801, March 21, including the Revised Statutes and the Code of Procedure, sustain this contention.

The language of the Code and Revised Statutes seems to imply that the certificate should speak of the time of its presentation to the sheriff (Code, 236; Laws 1842, ch. 197, § 3; Laws 1848, ch. 53 [3 Edm. R. S. 681], amending ch. 197 of Laws 1842, and prescribes [§ 2] that provisions of R. S. apply, viz., §§ 12-16, art. 8, tit. I., ch. V., Part II. of R. S.).

The notice and the attachment must then be available against property held by bank at time of attachment served, or at any time after up to the making of the certificate, *i. e.*, "to plea pleaded."

In view of the R. S., the law has never regarded this as a hardship, because publication under the Revised Statutes produced the same effect as is now claimed for notice and certificate; and the custom upon which all attachment laws are founded had the same effect. In other States the question has been passed upon *Glen v. Besler, &c. Co.* (7 *Md.* 287, 296). "It has been the general practice under an attachment system under the authority of the 5th and 6th sections of the Act of 1795, chapter 56, (Maryland Statutes), to condemn all credits or property in the hands of the garnishee for the debtor at the time of the trial." Between the levy and trial in this case the garnishee had come into possession of property of attachment defendant (291 and 296). Act of Md. 1795, ch. 56, § 6, provides for *capias ad res* against garnishee if he threatens to abscond. Section 5 provides simply that in all cases of attachment plaintiff may interrogate garnishee, "Who shall by rule of court answer each and every of the interrogations aforesaid, touching or concerning the property of the defendant in

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his possession or charge, or by him due or owing at the time of serving such writ of attachment, or at any other time, and if such garnishee shall neglect," &c. *Dunegan v. Byers* (17 Ark. 492-496), was under statute similar to Maryland providing for interrogatories and answers by garnishee as to indebtedness, &c. "At the time of service of a writ or any time thereafter;" held to reach after acquired property. The trustee can be charged for property coming to his hands prior to "disclosure," *i. e.*, to answer made (*Getchel v. Chase*, 17 N. H. 106-109). *Slints v. Hobensack*, 20 Pa. St. 412), expressly holds that property coming to hands of garnishee after attachment and before answer, is bound, citing custom of London; *Sargeant on Attachment*, and cases in the reports of Pennsylvania.

The certificate was not given by the bank to the sheriff at the time of the service of the warrant, but on May 8, 1875.

II. The point that as the statute requires the sheriff to certify the copy warrant, the signature of the sheriff to such certificate signed by his deputy, or the clerk of the deputy, by the latter's direction, is not in compliance with the statute, cannot be maintained (*Lynch v. Livingston*, 6 N. Y. 422, 431, and cases there cited).

See as an illustration also Code of Procedure, § 128: "The summons shall be subscribed by the plaintiff or his attorney," &c. Code of Civ. Proc. § 417: "It (the summons) must be subscribed by the plaintiff's attorney, who must add to his signature," &c. It has always been held that the signature need not be the real signature of the attorney; it may be printed (1 *Bliss Code*, notes to said section).

Barlow & Olney, for defendant.—I. There was no legal attachment. The copy of the warrant must be certified, and the "notice" signed by the sheriff (*Code Proc.* § 235). Even if "deputy sheriffs" are legally qualified officers, here, the copy of the warrant was not "certified" by a deputy

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sheriff, nor was the "notice" signed by a deputy. Both were in the handwriting of a clerk in the employ of the deputy. The question is, whether a public officer can delegate the power of making official signatures. There is no difference between the signature of the president or the governor to a law or to death-warrant, and the signature of a sheriff or his deputy to a "notice" (See *Blackwell Tax Titles* [4th ed.] 380).

In a case where the property of a citizen is taken from him by process *in invitum*, the statute must be pursued with the utmost strictness (See *Blackwell Tax Titles* [4th ed.] 37, 38, 51, 52, 63, 64; *Cruger v. Dougherty*, 43 *N. Y.* 107; *Curtiss v. Leavitt*, 15 *Id.* 250; *Sharp v. Spier*, 4 *Hill*, 76; *Spear v. Ditty*, 9 *Verm.* 283). Where the signature of a public officer is required, he must make it himself (*Chapman v. Inhabitants*, 56 *Maine*, 390; *Blackwell Tax Titles* [4th Ed.] 379; *Hannel v. Smith*, 15 *Ohio*, 134).

II. The court of appeals in the former decision herein (89 *N. Y.* 343) went wholly upon the findings of the referee, that the bank "had good reason to believe and did believe, that the securities deposited by Rodney were the property of the railroad company." If the bank *actually knew or believed*, that this was a mere cover and device, and that Rodney had no interest in the paper, it is undeniable that it would not be protected. But the finding of the referee that the defendant, at the time when Rodney deposited the certified check of \$6,600 to his own credit, "*did believe*" that it was the property of the railroad company (as distinguished from the finding that the defendant "*had reason*" so to believe), is not warranted by the evidence.

The authorities hold that "having reason to believe"—that is, the existence of suspicious circumstances, or even "gross negligence," is not enough to affect the *bona fides* of the holder of paper, and this, however the question arises. If the bank had discounted the paper for Rodney, the rule would apply. So when Rodney deposited it, the bank became the owner, and he became a mere creditor. The following cases hold that suspicions, or even gross

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negligence, do not affect the title of the holder of paper (*Magee v. Badger*, 34 *N. Y.* 249). "The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence." And "he is not bound to be on the alert for circumstances which might possible excite the suspicions of wary vigilance" (*Lord v. Wilkinson*, 56 *Barb.* 593; where the party had once actually known the fact but had forgotten it; *Insurance Co. v. Hachfield*, 73 *N. Y.* 228; *Bank v. Noxon*, 45 *Id.* 762-765; *Welch v. Sage*, 47 *Id.* 143, and at 147, where it is said that it is the duty of the court to direct a verdict unless the jury can find "fraud or bad faith;"; *Farrell v. Lovett*, 68 *Maine*, 326, where all the authorities are considered; *Hotchkiss v. National Bank*, 21 *Wall*, 354; *Murray v. Lardner*, 2 *Wall.* 110-121; 2 *Parsons Notes and Bills* [2d Ed.] pp. 269 and 279).

III. The legal title to the paper deposited by Rodney, and to its proceeds, was in him individually, and even if the equitable title, the real ownership, were in the railroad company, yet, attachments hold only legal titles, and the Park Bank had no right to hold equitable interests or titles under this process (*Thurber v. Blanck*, 50 *N. Y.* 80; *Greenleaf v. Mumford*, 35 *How.* 148). That a bank cannot inquire into, or dispute the title of a depositor, has been long settled (*Sims v. Bond*, 5 *Barn. & Adol.* 389; *Tassell v. Cooper*, 5 *C. B.* 525).

IV. An attachment only binds money or property in the hands of a third person (here the bank) at the time of its levy. Whatever the rule may be in what is known as "garnishment," or "trustee process," it is obvious that there is no analogy between the plea or answer in such proceedings, and the certificate provided for by § 236 of the old Code. The certificate is merely the giving of information as to the property held, and in contemplation of law it precedes the attachment, and is asked for in order to enable the property in the hands of the garnishee to be properly described (Code of Pro. § 236; *O'Brien v. Ins. Co.*, 56 *N. Y.* 60). In short, the certificate has no part in the levy, but the

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attachment is effective, although no certificate is given or asked for.

PER CURIAM.—Upon a careful consideration of the whole case it appears that all the facts found are fully warranted by the evidence, and that, upon those facts, the referee, under the decision of the court of appeals in 89 *N. Y.* 343, was bound to render a judgment for the plaintiffs in the amount he did. The additional questions raised by the defendant for the first time since the decision of the court of appeals referred to, were properly disposed of by the referee.

As to the disallowance of that part of plaintiff's claim which the referee rejected, the reasons assigned by him for the ruling made, seem to be well founded.

The judgment should be affirmed upon the opinion of the learned referee, without costs to either party upon this appeal.

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CASES DECIDED AT SPECIAL TERM.

JOSIAH C. REIFF v. THE WESTERN UNION TELE-
GRAPH Co., THE MUTUAL UNION TELE-
GRAPH Co., ET AL.*

Telegraph companies.—Consolidation by lease.—Laws 1870, ch. 568.—Injunction.—Corporations.—Statutory construction.

Upon a motion by a stockholder of the Western Union Telegraph Co., to continue a preliminary injunction against the consummation of an agreement for the acquirement by lease of all the property, lines, etc., of the Mutual Union Telegraph Co., it appeared that prior to the service of the temporary injunction, the transaction had been consummated excepting only the payment of the consideration by the Western Union Co.

Held, that as such a transaction between telegraph companies is authorized by Laws 1870, ch. 568, it cannot be enjoined as tending to create a monopoly and contrary to public policy.

Said lease was intended to cover the property of the lessors in different states, but contained a clause that it should not be construed to pass title to property in any state where such transaction would be illegal, and made provision for adjustment of consideration in such case. It appeared that the consolidation of telegraph companies was illegal in the state of Pennsylvania where certain of the property of said Mutual Union Co. was situate,

Held, no ground for an injunction; that it is doubtful whether the constitution and laws of a state can be enforced against companies formed under the laws of another state and having power to consolidate at home; that whether or not the provision in the lease intended to meet the above objection is sufficient, the objection is of no force here, for a partial failure of consideration contemplated by the contracting parties, and

* See *Williams v. Western Union Co.*, 48 *Super. Ct.* 849; 49 *Id.* 140; 98 *N. Y.* 162; *Id.* 640.

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with reference to which the bargain was closed, does not justify a court to interfere.

Defendant further objected that the consolidation of the Western Union Co., with the Atlantic & Pacific Co., and the American Union Co., and the increase of stock to pay therefor, and for distribution among the stockholders of the former company, had been adjudged illegal.

Held, that the decisions made, went only so far as to pronounce illegal the scheme involved in that consolidation, of gratuitously distributing among the stockholders about 15 millions of increased stock, which rendered that particular agreement null and void.

It was also objected that the stock and bonds of the Mutual Union Co. referred to in the lease were illegal.

Held, immaterial, if true, since they merely furnish the measure for the agreed rental; that it can make no difference to the Western Union Co. or its stockholders whether the rental is paid to the Mutual Union Co. or its stockholders; that as to the bonds, the Western Union Co. is estopped from disputing their validity.

Further, held, as to all of the above objections, that they fail to show want of power, and involve only matters of discretion affecting price and questions of policy, and courts cannot dictate the business policy to be pursued by a corporation, though such discretion may be unwisely, imprudently or even recklessly exercised by it.

Laws, 1870, ch. 568, provides that no purchase, sale, lease or conveyance by any telegraph company, under said act, "shall be valid, until it shall have been ratified and approved by a three-fifths vote of its board of directors or trustees, and also by the consent thereto in writing, or by vote, at a general meeting duly called for the purpose, of three-fifths in interest of the stockholders in such company, present or represented by proxy at such meeting." The scheme in question was duly ratified and approved by three-fifths of the board of directors of the Western Union Co., and three-fifths in interest of the stockholders consented thereto in writing.

Held, not a sufficient compliance with the statute, inasmuch as such consent of the stockholders was not given at a general meeting called for the purpose.

Accordingly held, that plaintiff was entitled to an injunction against the consummation of the lease in question during the pendency of the action, with leave to the Western Union Co., to convene a general meeting of the stockholders for the purpose of procuring the proper statutory ratification thereof.

The principles of the law of corporations and of statutory construction, stated and applied by the court.

Before FREEDMAN, J., at Special Term.

Decided March 27, 1883.

Opinion of FREEDMAN, J.

Motion for continuance of injunction.

The facts appear in the opinion.

Sterne & Thompson, attorneys; *George Biddle*, *John A. Beall* and *Simon Sterne*, of counsel for plaintiff.

Dillon & Swayne, attorneys for the Western Union Telegraph Co., and the individual defendants.

Alexander & Green, attorneys, for the Mutual Union Telegraph Co.

FREEDMAN, J.—This is a motion to continue a preliminary injunction restraining the Western Union Telegraph Co., its directors, etc., from making, or taking any steps to make an agreement for the acquirement by lease of the lines of the Mutual Union Telegraph Co. and restraining all the defendants from consummating any such lease, etc.

The action is brought by the plaintiff in his right as a shareholder of the Western Union Co., and its object and purpose is to permanently restrain the making or the consummation of any such lease.

On the motion it was made to appear by affidavits read on behalf of the defendants, that before the order containing the preliminary injunction was served, the agreement had been entered into, the lease executed and delivered, and the Western Union Co. put in possession of most if not all, the lines, and that about the only thing of substance remaining to be done towards full completion, is for the Western Union Co. to pay the consideration. For the purpose of the motion I must assume that that is the true situation.

The question then is whether the plaintiff, as an aggrieved shareholder of the Western Union Co., has shown any ground upon which a court of equity can restrain the final consummation of the transaction.

It is argued that inasmuch as the purpose of the lease is to create and maintain a monopoly of telegraphic business, the lease is contrary to public policy. If this question was to be determined upon the general principles of philosophy or the rules of the common law, there would be great force

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in the argument. But it is for the law-making power of a state to define what public policy upon a given point shall be, and, as shown by me in *Williams v. The Western Union Telegraph Co.*, the legislature of the state of New York has done so in unmistakable language in respect to telegraph companies. Power was given to every such company to increase its capital to any desired extent upon a compliance with certain formalities and conditions, and chapter 563 of the Laws of 1870 expressly provides that, in order to perfect and extend the connections of telegraph companies in this state, and promote their union with the telegraph system of other states, any telegraph company organized under the laws of this state, may lease, sell or convey its property, rights, privileges and franchises, or any interest therein, or any part thereof, to any telegraph company organized under or created by the laws of this or any other state, and may acquire by lease, purchase or conveyance, the property, rights, privileges and franchises, or any interest therein, or any part thereof, of any telegraph company organized under or created by the laws of this or any other state, and may make payments therefor in its own stock, money or property, or receive payment therefor in the stock, money or property of the corporation, to which the same may be so sold, leased or conveyed, etc., etc.

This statute has been heretofore construed by Judges BARRETT and VAN BRUNT of the supreme court, who, in well considered opinions came to the conclusion that the powers thereby granted were so comprehensive, and given in such clear and unmistakable language, that it is difficult to imagine what arrangements two telegraph companies could make in reference to the conduct of their business which would not come within the protection of the act. It was held that it was the intention of the legislature to give to telegraph companies the power to make any and all arrangements for the conduct of their business, either jointly or separately, which natural persons could possibly enter into, provided the consent of the directors and the stockholders of every such corporation shall be obtained and ex-

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pressed in a certain way. Upon careful consideration and due reflection I could find no reason for differing from the views expressed by the two learned judges referred to.

I must, therefore, hold that under the act of 1870, the Western Union Co. possesses power to lease the lines in question.

The next question then is, whether the lease, as made, calls for the interposition of the court. It was made by the Mutual Union Co. as lessor, to the Western Union Co. as lessee. By its terms the lessor grants and leases to the lessee all and singular the telegraph lines owned by the lessor in the United States, wherever the same may be located, together with all appurtenances, and including also all patent rights and interests in patent rights belonging to or held or controlled by said lessor, and all rights, easements and franchises of every description whatsoever appertaining thereto, saving and excepting only the charter and corporate franchises of the lessor, except so far as may be necessary or convenient for the use and operation of the lines and property leased. The lease is for the term of 99 years, and thereafter for such further term as will make the full term of 999 years, provided the same may be lawfully done under any renewal or extension of the charter of the lessor, or under the charter of any company succeeding to the lessor's franchises, or under the individual ownership of the capital stock of the lessor. It then further provides as follows, viz:

"It is, however, expressly understood and agreed that nothing herein shall be construed as intended or effective, to pass any title to, or interest in, any property of the lessor, except so far as by the constitution or laws of any State in which the said property is situate it may be lawful to transfer the same, but any property or interest which by reason of such laws or constitution may not lawfully pass to the lessee, shall be and remain the property of the lessor and under its exclusive control as completely in all respects as if this instrument had not been executed, but every such property and interest, upon demand of the lessee,

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shall by the lessor, its successors or assigns, be conveyed or transferred under any agreement permitted by the said constitution or laws, and the consideration therefor shall enure and belong to the lessee, but subject to be returned or accounted for to the lessor without interest or rental, otherwise than is herein provided for, upon the termination of this lease for any cause. * This provision shall apply with like force to any property or interest which would otherwise be liable to forfeiture under any contract made by the lessor.

“It is further agreed by and between the parties hereto, that in the event of a threatened termination, by limitation, of the present charter or incorporation of either or both parties hereto, during the term of this lease, proper steps shall be taken, in advance thereof, to procure an extension or renewal of the said charter or charters, or a re-incorporation of either or both of said parties, so as to cover the full term hereby created, and in such case the provisions hereof shall apply fully and in all respects to any such extension, renewal or re-incorporation.

“And in consideration of the premises, the lessee hereby covenants and agrees for itself, its successors and assigns, to pay during each and every year of the term hereby created, the rents following, to wit:

“First. The sum of three hundred thousand dollars per annum, payable semi-annually, on the first days of May and November, being interest at six per centum per annum, from the fifteenth day of February, one thousand eight hundred and eighty-three, upon the mortgage bonds of the lessor, to the amount of five millions of dollars, which said interest shall be paid directly to the holders of said bonds at the time and place or places covenanted therein, and in all respects as required by the tenor of said bonds, until the same shall be fully paid and discharged.

“Second. On the first day of May in each and every year, after the year eighteen hundred and eighty-five, the full sum of fifty thousand dollars, to be applied as a sinking fund for the redemption of said bonds, which sum

shall be paid to the Central Trust Company, of New York, as trustee, or his successors in the trust created by an indenture made on the twenty-second day of May, eighteen hundred and eighty-two, by and between the lessor and the said Central Trust Company and the lessee shall assume and pay said bonds as and when they may become due, and all sums which in the meantime become due for interest and sinking fund, except interest accrued prior to the fifteenth day of February, one thousand eight hundred and eighty-three; but the lessee shall not be liable to pay the portion of the rent above stipulated, except as may be required for such payments, nor after said bonds have been paid. *Provided*, that at or before the maturity of said bonds, the lessee may agree with the holders thereof for any extension or renewal thereof, or may demand and receive from the lessor new bonds of no greater amount than may then be outstanding of the bonds above mentioned, and bearing no higher rate of interest, to be used in substitution therefor. And in that case all payments required by said substituted bonds, whether for principal, interest or sinking fund, shall be made by the lessee. The lessee covenants that it will, at the request of the holders of said now outstanding bonds, or any of them, endorse thereon in proper terms its covenant to pay the interest and principal thereof.

“Third. The further sum of one hundred and fifty thousand dollars per annum payable semi-annually, on the first days of January and July in each year during the continuance of this lease; the said sum of one hundred and fifty thousand dollars to be paid to the lessor or its successor company until the first day of January, one thousand eight hundred and eighty-five, and thereafter to the stockholders of the lessor or its successor company, semi-annually, on such days, *pro rata* according to their respective holdings of such stock, and the lessee covenants that on and after the first day of January, one thousand eight hundred and eighty-five, or sooner, if the lessor or its successor shall so elect, and if the liabilities which the lessor herein cove-

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nants to meet and existing controversies as to the amount of capital which the lessor can lawfully put forth have been adjusted to the satisfaction of the lessee, then at the request of the stockholders or any of them of the said lessor or its successor company, the lessee will endorse in proper terms on the certificates of stock of the lessor or its successor company, and each of the said certificates respectively, its covenant to pay directly to said stockholders *pro rata*, the said sum of one hundred and fifty thousand dollars aforesaid; reserving, however, to the lessor and its successor corporation, the right to bring suit in its own name for or upon any default of the lessee in making any payment at the time specified herein.”

The lease contains numerous other provisions which it is not necessary to mention here.

The plaintiff insists that the lease is void under the constitution and the laws of Pennsylvania, and the laws of two other states. Only the constitution and the laws of Pennsylvania were laid before me, and from them it does appear that the consolidation of telegraph companies is not lawful in that state. But the constitution and the statutes of a state can have no extra-territorial effect, and hence it is a grave question whether they can be enforced against companies organized under and in pursuance of the laws of any other state and having power to consolidate at home. That there may be some difficulty, seems to have occurred to the contracting parties, for they sought to overcome it by an express provision of the lease to which I have referred. Whether in this way the difficulty has really been overcome, it is not necessary to determine. For the contracting parties concluded the bargain with the constitution and the laws of Pennsylvania and of the several states of the United States in plain view, and with reference to them, and hence, any difficulty that may hereafter arise from any such source, would at most only impair the consideration to be paid by the Western Union Co. But a partial failure of consideration which was contemplated by the parties as likely or possible to occur and

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with reference to which the bargain was closed, does not justify a court to interfere.

It therefore remains to be seen whether there was anything in the manner in which, and the circumstances under which, the lease was entered into, which gives to the plaintiff a standing in court. He complains, among other things: (1.) That about two years ago the Western Union Co. illegally consolidated with the Atlantic and Pacific Telegraph Co. and the American Union Telegraph Co.; that in consequence thereof the capital stock of the Western Union was illegally increased from about 40 to 80 millions of dollars; and that such consolidation and increase of stock have been adjudged illegal; and (2.) That there were illegalities in the issue of the stock and the bonds of the Mutual Union Co. referred to in the lease, in consequence of which proceedings were commenced by the attorney general to vacate the charter of the Mutual Union Co.

Upon these points the papers submitted on both sides present a sharp conflict of evidence. Much, if not most, of plaintiff's case is made up of mere conclusions. The affidavits on the part of the defendants negative every averment of the complaint and the moving affidavits which has any appearance of materiality. Of these two points, therefore, it may be said that all the equities claimed by the plaintiff have been fully met.

But beyond that, it is not true that the courts have denied the power of the Western Union Co. to consolidate with the two companies named or to increase its stock to 80 millions. The decision made only went so far as to adjudge that the scheme involved in that consolidation of gratuitously distributing among the shareholders of the Western Union about 15 millions of stock, was illegal and rendered the particular agreement for consolidation null and void. If those 15 millions of stock have been illegally distributed, the statute gives a remedy to the corporation against the directors who caused it to be done. Moreover it is not even pretended that the lease now complained of

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in any way grew out of, or has any relation to, the said consolidation.

So in respect to the alleged illegality of the stock and the bonds of the Mutual Union Co., it may be said that, even if the charge were true, it would be immaterial. They merely furnish the measure for the agreed rental, and it can make no difference to the Western Union Co., or to its stockholders, whether this rental is paid to the Mutual Union Co. or to the holders of its bonds or its stock. Concerning the said bonds it may be further said that the Western Union Co. cannot dispute their validity any more than it could dispute the validity of a bond and mortgage for usury after it bought the mortgaged premises and assumed to pay the mortgage. This being so, the stockholders of the Western Union Co. are in no better position. Nor can any stockholder of that company champion the supposed rights of the stockholders of the Mutual Union Co., none of which has complained.

The points made by the plaintiff which have so far been considered, fail to show want of power. They involve only matters of discretion affecting the price and questions of policy. The discretion may have been unwisely, imprudently, or even recklessly, exercised, and the policy pursued may be questionable. But no court can dictate the business policy to be pursued by a corporation, nor can a court prevent a party capable of contracting from making a bad bargain. Neither can an unprofitable bargain which in itself is not illegal or immoral, be set aside, when made, except upon proof of fraud or mistake of fact amounting to at least a partial failure of consideration. There is no pretense that any such element exists in this case, nor has it been claimed that the directors of the Western Union Co. have any personal interest which conflicts with a proper and faithful discharge of their duties towards the stockholders.

Moreover, the defendants insist, and by affidavits have shown that the lines of the Mutual Union Co. were needed for the more convenient and proper despatch of the

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business of the Western Union Co.; that they were leased upon the best terms attainable, and that they may be reasonably expected to yield a profit. These are matters which can be determined only by the directors and a certain proportion of the stockholders of the Western Union Co. in the manner prescribed by law, and if they were so determined the law has been satisfied and individual stockholders who are dissatisfied, must submit.

The only remaining question, therefore, is whether the forms of law have been complied with.

The act of 1870 herein before referred to expressly provides that no purchase, sale, lease or conveyance by any telegraph company of this state authorized by said act, "shall be valid until it shall have been ratified and approved by a three-fifths vote of its board of directors or trustees, and also by the consent thereto in writing, or by vote, at a general meeting, duly called for the purpose, of three-fifths in interest of the stockholders in such company, present or represented by proxy, at such meeting."

That the lease was duly ratified and approved by a three-fifths vote of the board of directors of the Western Union Co. fully appears. Furthermore the defendants allege in their affidavits that three-fifths in interest of the stockholders consented thereto in writing. This the plaintiff claims was not a sufficient compliance with the statute, inasmuch as the said consent was not given at a general meeting called for the purpose. This is a new point which was not involved in any of the preceding cases.

There can be no doubt that the grammatical construction of the last clause of the act of 1870 supports plaintiff's claim, and this is so whether regard be, or be not, had to punctuation. In the quotation made by me above, the punctuation strictly corresponds with that of the original act on file in the office of the secretary of state. By that construction the alternative of writing or voting their assent is given to the stockholders, but that alternative is only to be exercised at a general meeting duly called for the pur-

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pose. No other construction than this can be given to it without a highly questionable transposition of words.

Now it may be, and on the part of the defendants it has been, argued with great plausibility, that the legislature must have meant to make the assent in writing equivalent to a vote at a meeting, because the deliberation with which a stockholder would sign the written instrument, no matter where, may well be deemed equivalent, if not superior, to that with which he would cast his vote at a meeting.

If it could be clearly ascertained that such was the intention of the legislature, effect should be given to it in spite of the language used, for according to the rules applicable to the interpretation of statutes the intention clearly deducible prevails over the literal sense of the words used. But the same rules also demand that, in order to get at the intention, recourse must first be had to the words used. The intention of an act is not to be presumed, but is to be gathered from its language, and if that can be done, the policy of the enactment is not to be regarded. And all the words are to be construed together, and effect is to be given to every one of them, if it can be done without reaching absurd conclusions. It matters not what the consequences may be. A court is not at liberty to speculate on the intention of the legislature when the words are clear, or to construe an act according to its own notions of what ought to have been enacted. To give it a construction contrary to, or different from, that which the words import, is not to interpret law, but to make it.

In view of these rules which are well settled, the fallacy of the argument advanced by the defendants, however plausible it may appear from the start, becomes apparent, for it is impossible to ascertain from the act as a whole, the intent contended for. On the contrary, it appears that, if in point of fact the legislature did so intend, it not only failed to give proper expression to it, but also employed language which leads to a different conclusion. Moreover, the grammatical construction leads to no absurd conclusions and may even be supported by substantial reasons.

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It is a fundamental principle in the general law of corporations, in the absence of any specific enactment to the contrary in the charter, that all business requiring the assent of stockholders must be transacted at a duly convened meeting of those constituting the body corporate, and the only legal concurrence of stockholders in measures upon which they are called upon to act, is to be expressed at such meeting, after full opportunity of discussion and debate, and full permission to those opposed to any measure favored by a majority, to attempt by persuasion to reverse the prevailing sentiment. As is said by Mr. Brice: "More than this, they (the minority) can demand a fair hearing, and that their wishes and arguments should be listened to and duly weighed" (*Green's Brice*, p. 71). This being the general rule, and one of the most valuable privileges of the members of a corporation, it will never be assumed that the legislature intended to abolish the right except under stress of a clear and imperative enactment to that effect.

The terms and conditions upon which assent should be given to a scheme like the one under consideration, are pre-eminently matters for discussion and consideration by the stockholders at a general meeting duly called for that purpose, and such a meeting the statute contemplates.

The importance of the statutory requirement in the present case becomes still more apparent when the following circumstances are considered: The defendants say that three-fifths in interest of all the stockholders of the Western Union Co. on being privately applied to, consented in writing to the consummation of the lease. But they furnish no list and disclose no names. Now it so happens that for a considerable time prior thereto the transfer books were kept closed, but that nevertheless during that period transfers of vast numbers of shares of stock took place daily in Wall Street. This raises a necessity for scrutiny. It becomes important to be seen whether the alleged stockholders who signed the consent, were at the time actual *bona fide* stockholders. The most suitable occasion to determine

Statement of the Case.

in the first instance who is, or is not, such a stockholder, is a meeting duly convened for the purpose on notice to all.

My first conclusion, therefore, is that the true interpretation of the statute corresponds with its grammatical construction, that the failure of the Western Union Co. to obtain the consent of the requisite number of its stockholders at a general meeting duly called for that purpose, constitutes a defect, but the only defect, in the proceedings taken for the acquirement of the lines of the Mutual Union Co.; and that in consequence thereof the plaintiff, as an aggrieved stockholder in the Western Union Co., is entitled to have the injunction against the consummation of the lease and the payment of the consideration, or any part thereof, continued during the pendency of the action. Leave, however, should expressly be granted to the defendant, the Western Union Co., to convene a general meeting of its stockholders for the purpose of procuring the consent to the lease of the requisite number of stockholders in the manner required by the statute, and, in the event that such consent should be duly obtained, the order should further provide that thereupon, on due proof of such fact, any of the defendants may at any time thereafter apply for the dissolution of the injunction.

Let an order to the foregoing effect be presented for settlement on notice.

SUSAN EGAN v. JOSEPH LYNCH.

Contempt.—Perjury in justification of sureties on undertaking.

Where on an examination of the sureties to an undertaking given on the arrest of defendant, it appears that such sureties were entirely irresponsible, and knew themselves to be so at the time they justified, they will be held guilty of a contempt of court.

Though they may thereafter be indicted for perjury, the court has power to attack and summarily punish them for their offense against its dignity, by imposing a fine sufficient to indemnify plaintiff for the loss he has suffered, and by imprisonment for six months and until the fine is paid.

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If they are indicted for perjury, the court trying the indictment will in passing sentence, take into account the previous punishment.

Such a commitment is not in violation of Art. I, § 2 of the State Constitution, nor of Art V. Amendments U. S. Constitution.

Before TRUAX, J., at Special Term.

Decided April 16, 1883.

Motion to commit sureties on undertaking, for contempt.

Susan Egan sued Joseph Lynch, in the superior court, claiming \$25,000 damages for alleged breach of promise of marriage. Lynch was arrested and held in \$10,000 bail, Daniel Peixotto and Horatio M. Sadler being sureties upon the undertaking on which the order of arrest was granted. The court afterwards reduced the bail to \$250, and an order was granted requiring F. W. Simonson, the plaintiff's attorney, to show whether he was an attorney and counselor at law, and requiring the sureties to appear and be examined as to their pecuniary qualifications. When the case was subsequently called for trial there was no appearance for the plaintiff, and the complaint was dismissed, with an allowance of \$750 to the defendant. On the examination of the sureties it appeared that they were entirely irresponsible. The sureties were fined for contempt of court in having falsely sworn to their pecuniary responsibility in the amount of the judgment recovered by the defendant and directed to be imprisoned for six months and until the fine was paid.

Abraham Kling, for the motion.

Vanderpoel, Green & Cuming, opposed.

TRUAX, J.—The examination of the sureties shows that they were not worth the sum in which they justified, and that they knew they were not worth that sum when they justified; that they became sureties for the purpose of enabling the attorney for the plaintiff to obtain the order of arrest, and that their misconduct in so doing defeated and impaired the rights and remedies of the defendant.

The defendant would not have been arrested and held to bail in the sum of \$10,000 if Peixotto and Sadler or some one else had not acted as sureties for the plaintiff. The defendant was entitled to two responsible sureties upon the undertaking which was given upon obtaining the order sought. He lost this right by the fraudulent acts of this attorney for the plaintiff, and the false swearing of the sureties. No plainer case of an attempt to pervert the course of justice and to impair and defeat the rights and remedies of a party can be shown than the one now presented to this court. Perjury has always been held to be a great contempt of court (*Stackhouse v. French*, 1 *Bing.* 365).

It is true that the sureties may, and should be, indicted for their perjury. But their indictment and conviction will be a punishment for the offense that they have committed against the people of this state, and will not purge the contempt. Their offense against the court will still remain unpunished. That offense the court has power to punish by imposing upon them a fine sufficient to indemnify the defendant for the loss and injury he has sustained through their misconduct, and by imprisoning them for six months, and until the fine is paid (*Code Civ. Proc.* § 2285).

If they should happen to be indicted and convicted for their perjury, the court before which they are convicted will, in pronouncing its sentence, take into consideration the previous punishment (*Code Civ. Proc.* § 2287).

It was suggested on the argument that this application could not be granted, because a commitment to prison would be a violation of that part of the constitution of this state which declares that "the trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever" (art. 1, sec. 2). This suggestion is untenable. Courts of justice have had the power of punishing contempt by summary proceedings from time immemorial. The process of attachment for contempt must necessarily be as ancient as the laws themselves—for laws without a competent authority to secure their administration from

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disobedience and contempt would be vain and nugatory (4 *Black. Com.* 286). To punish for contempt was part of the common law of England when the constitution of 1777 was adopted. That constitution (art. 35) declared that the common law of England should be and continue the law of this state. The power to punish for a contempt is a branch of the common law which has been adopted and sanctioned by our State Constitution (*Yates v. Lansing*, 9 *Johns.* 416). Therefore, this is not one of the cases in which trial by jury "has been heretofore used."

Nor is this proceeding within the prohibition of that portion of the constitution of the United States which provides that "no person shall be deprived of life, liberty, or property without due process of law." This is a due process of law, and was recognized as such when the constitution of the United States was passed. It is not to be doubted, says Chancellor Kent, that the constitution and laws of the United States were made in reference to the existence of the common law. In many cases the language of the constitution and laws would be inexplicable without reference to the common law; and the existence of the common law is not only supposed by the constitution, but it is appealed to for the construction and interpretation of its powers (1 *Kent Com.* 336).

The actual loss which occurred by and through the misconduct of the sureties is the amount of the judgment which the defendant has recovered against the plaintiff, to wit, \$772.52. The sureties are fined that amount. They will also be imprisoned for six months, and until the above fine is paid.

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FREDERICK W. MUSER, ET AL., v. JULIA MILLER,
ET AL.

*Married woman—when husband need not be joined in actions against her—
for what torts she may be arrested.*

Willful injury to property, does not mean, under § 553 Code Civ. Pro., an injury merely to the thing itself, but also an injury to the owner's right in and to the thing.

A married woman may be arrested in an action for damages for willful injury to property, done by her in the management of her own separate business. The reason of the common law rule in regard to joinder of the husband in actions against the wife, has ceased to exist and the rule itself has been abrogated, in cases of torts and contracts affecting the separate property of the wife, as connected with or arising from the management or control of her own business; and the exemption of married women from arrest in such actions, which sprang solely from the reason of the rule, has ceased in all cases where the law in general terms allows a woman to be arrested.

Before FREEDMAN, J., at Special Term.

Decided June 18, 1883.

Motion to vacate order of arrest.

Defendant was a married woman carrying on business as a dealer in laces, on her own account. The action was to recover \$24,819, the value of certain laces, stolen from plaintiff, and alleged to have been purchased by defendant from the parties engaged in the theft, with knowledge that they were stolen. Defendant was arrested, and her husband was made a party to the action.

Further facts appear in the opinion.

Charles S. Spencer and *James C. P. Robinson*, for the motion.

D. M. Porter and *James M. Smith*, opposed.

FREEDMAN, J.—The plaintiffs have made out a *prima facie* case against the defendant Julia Miller, which has not been overcome by the proofs adduced by her to such a degree that I can determine the merits. The testimony of

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James J. Madden, the thief, and Fannie Lewis, the receiver, is corroborated in several particulars, and especially by the circumstance that some of the stolen goods have been shown beyond controversy to have been in the possession of the defendant. Her statement by affidavit that she paid a fair value for the goods she did purchase from the receiver, cannot overcome the case made against her, because from the fact that she was a dealer in laces since 1877, and a purchaser from leading merchants in New York and had even received goods on consignment from the plaintiffs in this action, the inference may be drawn that her statement is not true and that she knew at the time that she was getting the goods very much below their intrinsic as well as market value. Without going into particulars, it is sufficient to say that much of what the defendant shows, may be true and yet a *prima facie* case remains against her that she committed at least a willful injury to plaintiffs' property within the meaning of § 553 of the Code of Civil Procedure. By the affirmance of the court of appeals (64 N. Y. 625), of *Duncan v. Katen* (6 Hun, 1), it is now settled that in such a case a willful injury to property does not mean an injury merely to the thing itself, but an injury to the owner's right in and to the thing.

The case at bar, therefore, falls within that class of cases in which the rule prevails that the court will not try the merits upon affidavits. This being so, the order of arrest cannot be vacated unless the defendant's point is well taken that, because she is a married woman, no order of arrest will lie against her under any circumstances.

At common law a married woman could not be held to bail in an action founded upon her personal tort, though the husband might be held and might be compelled to give bail for both (*Grah. Pr.* 127; Anonymous, 1 *Duer*, 613; *Schaus v. Putscher*, 16 *Abb. Pr.* 353, note). That the Code in force before the Code of Civil Procedure did not change the rule upon this point was distinctly held in *Solomon v. Waas* (2 *Hilt.* 179).

The necessity for holding the husband, arose from the

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legal effect of the marriage relation. At common law the husband and wife by marriage became one person in law, that is, the very being, or legal existence of the woman, was suspended during the marriage and incorporated or consolidated into that of the husband. But the necessity for such joinder was not, strictly speaking, because the husband was absolutely liable, but it grew out of the fact that a suit could not be maintained against a wife alone during coverture (*Bishop Mar. Women*, § 254).

Under the statutes of this state any married woman may take and hold real, as well as personal property, separate and apart from her husband, and enjoy the same, and the rents, issues and profits thereof, in the same manner as if she were a single female; and she has express authority to bargain, sell, assign and transfer her separate personal property, to carry on any trade or business, and perform any labor or services on her sole or separate account. The power thus conferred to carry on a trade or business includes the ability to make bargains and contracts in relation to it in almost any mode known to the law and in accordance with the practice of the commercial community, and such bargains and contracts have been held valid against her, notwithstanding her coverture, provided they were made in the course of her trade or business and as an incident to it. Upon any such bargain or contract she could, since 1860, sue and be sued in the same manner as if she were sole, and the same may be said generally concerning all matters having relation to her sole and separate property. It was held, however, that these changes by statute did not alter the common law liability of the husband for the mere personal torts of the wife, but that the rule was changed only in cases of torts committed in the management and control of her separate property (*Baum v. Mullen*, 47 N. Y. 579; *Kowing v. Manly*, 49 *Ib.* 192). But even then the husband was held in some cases to be still a necessary party to the action.

Thus the rule as to the necessity of the joinder of the husband with the wife in a case of tort committed by the

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wife, remained until the enactment of the Code of Civil Procedure, section 450 of which, as originally enacted, read: "In an action . . . a married woman appears, prosecutes or defends alone . . . as if she was single." In his note Mr. Throop says, that that section was intended to sweep away all distinctions between a *feme sole* and a *feme covert*, in respect to suing and being sued; and in *Janinski v. Heidelberg* (21 *Hun*, 439), it was held by the general term of the supreme court that the language used was comprehensive enough to do it.

In 1879, section 450 was amended by adding at the end thereof the further express provision that in any action or special proceeding affecting the separate property of a married woman it is not necessary or proper to join her husband with her as a party. Since that amendment it was held in *Fitzgerald v. Quann* (1 *Civ. Proc.* [McCarty] 273), that it is now no longer necessary or proper to join the husband as a defendant in an action against the wife for her personal tort, though such tort was wholly unconnected with the wife's separate estate or the management or control of her business, and that the reason of the rule in regard to the joinder had wholly ceased to exist. For the purpose of determining the motion before me it is not necessary to go quite so far. It is sufficient to hold that the reason of the rule in regard to the joinder has wholly ceased to exist and the rule itself has been abrogated in all cases, of torts as well as contracts, affecting the separate property of a married woman or connected with or arising from the management or control of her business. For it is conceded that the wrongful acts complained of in the case at bar were committed in the course of the defendant's business as a dealer in laces. It follows then, that, if to the extent stated the reason of the rule has ceased to exist, and the rule itself has been abrogated, the exemption of a married woman from an arrest which sprang solely from the reason of the rule, must cease, whenever the rule ceases, in all cases in which the law expressly authorizes the arrest of females in general terms. In looking for

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such authority it will be found that § 553 of the Code of Civil Procedure gives the right of arrest during the pendency of the action against *any* woman in an action to recover damages for a willful injury to person, character or property.

Having already shown that the case made out against the defendant is one which falls within the class of cases specified in § 553, and it appearing that the wrongful acts charged against the defendant were committed by her in the management of her business, she is not entitled to have the order of arrest vacated, for the sole reason that she is a married woman.

From the examination so far made it appears that no ground whatever exists for the vacation of the order.

As to reducing the bail I have also failed to discover any ground upon which the defendant can be relieved. According to some of the testimony the defendant had all the goods which were stolen from the plaintiffs, and if the jury should, under all the circumstances, find such testimony worthy of belief, their verdict will be for an amount which, with interest and costs, will exceed the amount of bail specified in the order. In view of such contingency the plaintiffs have a right to have the bail maintained as originally fixed.

The only relief I can grant, is to order an immediate trial of the issues by jury on the ground of the actual imprisonment of the defendant. If she so elects, her case may be set down for trial for Wednesday of this week with a preference on the day calendar.

Motion to vacate order of arrest denied with \$10 costs. Order to be settled on notice.

Statement of the Case.

MICHAEL GILMAN, AS ADMINISTRATOR, ETC.,
v. HENRY McARDLE.

Husband and wife—right of former to administer her estate—such right passes to his administrator on his death.—Deposit of money for masses to be said after death.—Trusts, requisites of.

Where G., a married woman, placed into the hands of the defendant, an undertaker, a certain sum of money with the direction and upon the condition that the same should be used by the defendant, in the first instance, for the purpose of defraying the expenses of her funeral and of that of her husband and of the erection of a suitable monument to their memories, and, in the second place, to have masses said by a Roman Catholic priest for the repose of their souls; and Mrs. G. thereupon died intestate and without issue; and subsequently the husband died intestate and without having taken out letters of administration upon her estate or having reduced the money to possession; and thereafter the plaintiff, as administrator of the estate of the husband brought an action to compel the defendant to account,

- Held*, 1. That upon the death of the wife the surviving husband, at common law acquired the right to administer upon her estate for his benefit, subject only to the payment of her debts, and that this right has not been abridged by statute in the case of the death of a married woman intestate and without issue.
2. That by statute the husband, upon the death of the wife, became entitled to administration upon her estate in preference to any other person.
3. That upon the death of the husband his rights passed to his legal representative, and the plaintiff, as the administrator of the husband's estate, in his representative capacity as such, might have had letters of administration upon the estate of the wife, but such letters were not necessary to enable him to maintain the action.
4. That the disposition made by Mrs. G. of her money, even if otherwise effectual, would, in so far as it relates in the saying of masses, be void according to the law of England as made for a superstitious use, but that this doctrine cannot prevail in the courts of the United States or of the several states thereof because it is contrary to the spirit of the constitutional provisions prohibiting discrimination on religious grounds.
5. That the disposition of the money constituted neither a gift *inter vivos* nor a gift *causa mortis*, because there was no intention of parting with the title.
6. That, though Mrs. G. may have sought to create a trust for the uses specified, and though a trust relating solely to personal property may be created by parol, the disposition made of the money was not a trust

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- which the law can recognize because no title passed, and, because, after the deaths of Mr. and Mrs. G., there was no longer any person in existence or capable of coming into existence who as beneficiary could call the trustee to account if the latter should refuse to execute the trust. The souls of Mr. and Mrs. G. cannot in law or equity be treated as beneficiaries.
7. That, no title having passed by either a bequest or gift or legal trust, the disposition of the money amounted to a naked deposit into the hands of an agent with certain instructions. In such a case it is a fundamental principle of the law of this state that the principal may at any time revoke the instructions and recover his property, and that if he does not do so in his lifetime and dies intestate, his death revokes the authority of the agent, and that as the title must go somewhere, it goes to the administrator of the intestate.
8. That the plaintiff is entitled to judgment directing the defendant to account and pay over; but upon the accounting the defendant is entitled to protection for all acts done by him in good faith pursuant to the instructions received from Mrs. G. up to the time the plaintiff demanded the money.

Before FREEDMAN, J., at Special Term.

Decided July 2, 1883.

Trial of equitable action.

John Brice, attorney, and *William L. Snyder*, of counsel, for the plaintiff.

C. W. Bennett, attorney, and *Richard L. Sweezy*, of counsel, for the defendant.

FREEDMAN, J.—This is an equitable action brought by Michael Gilman, as administrator of the estate of James Gilman, deceased, and its object is to have a certain trust declared null and void and to compel the defendant as the alleged trustee to account.

On August 23, 1882, Margaret Gilman, then about eighty-five years old, placed about \$2,300 of money belonging to her into the hands of the defendant, with the direction and upon the condition that after the death of herself and her husband, who was then over ninety years of age, the defendant should use the money, in the first place, to pay funeral expenses and erect a suitable monument to their memories, and in the second place, to have masses said by a Roman Catholic priest for the repose of their

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souls. About eight days after the delivery of the money to the defendant, viz: September 1, 1882, Margaret Gilman died intestate and without issue, and on October 13, following, James Gilman, the husband, also died intestate. The plaintiff as next of kin of James Gilman, took out letters of administration on the estate of James Gilman, and as such administrator demanded that the defendant account for and pay over the money received by him, and upon defendant's refusal to do so brought this action. The theory of the action is that at least the second use or purpose of the trust is contrary to public policy and wholly illegal and void.

The first question that presents itself, is whether the plaintiff has legal capacity to maintain the action. Its determination depends upon the correct solution of the further question whether the right of James Gilman to administer upon the estate of his deceased wife, conferred upon the plaintiff as his legal representative the capacity to sue for a chose in action belonging to the wife at the time of her death, and not reduced to possession by the surviving husband in his lifetime.

At common law marriage was an absolute gift to the husband of the personal property of which the wife was actually possessed, and of such as came to her during coverture. As to choses in action, marriage was only a qualified gift, conditioned that the husband reduce them to possession during the existence of the marriage relation. As to all personal property possessed by the wife at the time of the marriage and such as came to her during coverture, and also such choses in action as the husband reduced to possession during coverture, the title was vested in the husband, and upon his death such personal property and choses in action went to his representatives, and not to the wife; and if the wife died first, they were his after, as they were before her death, and no administration was necessary. As to choses in action not reduced to possession during marriage, if the wife survived the husband, they went to her; and upon her death, to her representatives; but if the

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husband survived he had the sole right to administer for his own benefit and enjoyment in preference to the next of kin.

These common law rights to the husband, and the consequences flowing from them, are still recognized in this state in the case of a wife dying intestate leaving no descendants and a husband surviving.

The statutes of this state give to the wife the control of her separate estate during her life and she may dispose of it by will. In case of a will the testamentary disposition stands. In the absence of a will, if there are descendants, the succession is regulated by the statute of distribution. But in case a married woman dies intestate and leaves no descendants, the common law right of the surviving husband to administer his deceased wife's estate, and through such administration to acquire the title to her personal property and choses in action not reduced to possession during coverture, subject only to the payment of her debts, still exists. This has been expressly decided in *Barnes v. Underwood* (47 N. Y. 351). And in all cases, it is now provided by statute that in the case of a married woman dying intestate, her husband shall be entitled to administration in preference to any other person (3 R. S. 6th Ed. 78, § 31, formerly § 27); that if he shall not take out letters of administration on her estate, he shall be presumed to have assets in his hands sufficient to satisfy her debts, and shall be liable therefor; and that, if he shall die, leaving any assets of his wife unadministered, they shall pass to his executors or administrators as part of his personal estate, but shall be liable for her debts to her creditors, in preference to the creditors of the husband (*Id.* § 33, formerly § 29).

From the foregoing it is clear that if, upon the death of Margaret Gilman, her husband, James Gilman, had taken out letters of administration upon her estate, his right of action against the defendant now here, would, upon his death, have passed to the present plaintiff as administrator. But as James Gilman did not do so, it is necessary to deter-

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mine whether that omission affects the standing of the plaintiff in court. From what has been said in *Squib v. Wyn* (1 *Peere Wms.* 378) ; *Elliot v. Collier* (1 *Wils.* 169), and 2 *Kent's Com.* 136, it would seem that it is not. At any rate, my judgment is that under the true construction of what formerly was the twenty-ninth section of the statute above referred to, it is not ; because, above the conflict of judicial expression in the books as to whether the husband in a case like the present upon the death of his wife takes a chose in action not reduced to possession by him during coverture, as husband or as administrator, there stands forth the universally conceded fact that, in some way or other, he is entitled to the ultimate benefit to be derived therefrom because he sustains the relation of husband. From this it follows as a logical and necessary sequence, that his right in this respect at least, by force of the statute, passes to his personal representatives. That in a case like the present the administrator or executor of the estate of the husband, in his representative capacity as such, may have letters of administration upon the estate of the wife, was decided in *Matter of Harvey* (3 *Redf.* 214), affirmed by the general term of the supreme court ; but that such letters are not necessary to enable him to maintain an action, was also decided in *Roosevelt v. Ellithorp* (10 *Paige*, 415), and *Lockwood v. Stockholm* (11 *Id.* 87).

Whether, therefore, the fund in suit be regarded, for the purposes of determining the question of plaintiff's capacity to sue, as a chose in action, or as property legally in the wife's possession at the time of her death (upon the theory that the possession by the defendant as the wife's trustee or agent under a void trust was not adverse, but in the eye of the law was still her possession), the plaintiff, in either case, has legal capacity to sue for it.

This brings me to the consideration of the second question, viz : the validity or invalidity in law of the disposition of the money made by Margaret Gilman. Such disposition constituted neither a gift *inter vivos*, nor a gift *causa mortis*, for the requisites of a gift were wanting.

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There was no intention of parting absolutely with the title and control, but specific uses were enumerated, to which, after the death of Mrs. Gilman and her husband, the money was to be appropriated. By such a disposition Mrs. Gilman sought to create a trust for the uses specified. In so far as the trust thus attempted to be created has been executed by the payment of funeral expenses and the erection of monuments, the plaintiff does not seek to hold the defendant liable. The controversy relates to that part of it which directs the saying of masses, and the discussion will hereafter be confined to that point.

In England this use would be held void as a superstitious one. In that country, when land is given, secured or appointed for or toward the maintenance of a priest or chaplain to say mass; for the maintenance of a priest, or other man, to pray for the soul of any dead man; to have and maintain perpetual obits, lamps, torches, etc., to be used at certain times to help to save the souls of men out of purgatory; the king or queen, by force of certain statutes, is authorized to direct and appoint all such uses to such purposes as are truly charitable (23 Hen. VIII., ch. 10; 1 Edw. VI., ch. 14; *Bac. Ab. Charitable Uses and Mortmain, D.*; *Duke on Char. Uses*, 105). These statutes were aimed at such usages of the Roman Church as were condemned by the Protestant Reformation. There is no express English statute, however, making superstitious uses, in general, void, and the 23 Hen. VIII., relates in terms only to assurances of land to churches and chapels. But although there is no present English statute rendering the disposition of personal property, or all dispositions of personal property, for superstitious uses, void, the courts of England have, nevertheless, in all such dispositions of property, whether real or personal, held the uses to be void upon general principles of public policy.

In the state of New York, and in all the states of the United States, where there is no established state religion, where all religious opinions are free and the right to exercise them is secured to the people by constitutional guaran-

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tees, there is no such statute and no such policy, and I do not hesitate to say that the doctrine of superstitious uses as enforced by the courts of England is against the spirit of our institutions and should not be adopted by our courts. It is a fundamental principle of our law that a man may do with his own as he pleases, provided he does not violate the law nor devote his property to an immoral purpose. Similar views have been expressed by Judge TULEY, of Chicago, in *Kehoe v. Kehoe*, and by the surrogate of Kings county, N. Y., in the matter of the probate, etc., of the will of Maria Hagenmeyer, deceased. In these two cases, however, the question presented itself upon a testamentary disposition.

The question of policy having been disposed of, in so far as it rests upon religious grounds, it remains to be seen whether the trust sought to be created is invalid, for any reason known to law or equity as administered in this country. It clearly cannot be upheld as a trust for a charitable use. According to the English law, based upon certain prerogatives of the crown and the statute of 43 Elizabeth, ch. 4, the court of chancery, in England, exercised a certain peculiar jurisdiction over charitable trusts, in determining and applying gifts to charity, where the donor had failed to define them, and in framing schemes of approximation near to or remote from the donor's true design. Where, therefore, there was a gift for a general and indefinite charitable purpose, either the king, under his sign manual, or the court representing him, disposed of the subject donated. The statute of Elizabeth was repealed by the legislature of this state in 1788, and the prerogative of the Crown had, of course, no effect in this state; but the powers and jurisdiction of the English court of chancery, as they existed in England at the time of the American revolution, were supposed to have followed and remained with courts of equity in this state, and the law of charities, it was claimed, independent of the statute of Elizabeth, was in force, prior to that statute, and continued after its abolition. In the consideration of this subject by the courts of this country, it was, however, determined that the English doctrine with

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respect to charitable trusts, as it existed at the time of the revolution, according to the common law, irrespective of statutory enactment, was only to be considered in force here so far as it was applicable to our circumstances and conformable to our institutions, and not repugnant to them. With this determination the power exercised by the English court of chancery to declare a trust void on the ground that it was for a superstitious use, and to direct the use to a purpose, truly charitable, wholly ceased to exist in this country.

But a charity must still be a gift, (1) either for the promotion of science or learning or useful knowledge ; (2) or for the relief of the sick, lame or infirm ; (3) or for the relief of the poor, or the relief or redemption of prisoners or captives ; (4) or for the building or repairing of bridges, ports, highways, churches or other public structures. In short, a charity is a gift for a general public use, extending to the poor as well as to the rich, which is free from any personal, private or selfish taint. The disposition made by Mrs. Gilman of her money cannot be brought within this definition. Nor can it be said that such disposition created a trust for a pious use. Such a trust consists of a gift for the dissemination of moral or religious teaching or for the promotion of public worship or morality. All gifts falling within this description are regarded as pious uses, and by a broad and liberal construction are enforceable as such in equity. Since the Revolution pious uses have been upheld in this country without regard to sect or denominational distinction. The disposition made by Mrs. Gilman does not fall within this class of uses.

On the other hand it will be found, that the trust purpose of the trust sought to be established by Mrs. Gilman, is open to no legal objection, because the trust, if it is one, relates solely to personal property, and as such is not within the Statute of Uses and Trusts of this State. A trust of personal estate may be created for any purpose which is not illegal, so far as relates to the mere vesting of the legal title to the property in the trustee (*Gott v.*

Cook, 7 *Paige*, 521 ; Bucklin v. Bucklin, 1 *Keyes*, 141 ; Perry v. Foster, 62 *How.* 228.)

So if the trust were otherwise valid, it would not be a fatal objection that it was not declared in writing (*Martin v. Funk*, 75 *N. Y.* 134.)

But the difficulty with the defendant's case is that the trust sought to be created by Mrs. Gilman, is no trust at all known to law or equity, because there is no beneficiary or *cestui que trust* in existence, or capable of coming into existence, under the trust, and that, if for the reason stated, the trust fails, the disposition made of the money cannot stand, because it amounted neither to a gift nor to a disposition by last will and testament. Our statutes prescribe how the personal property of a person dying intestate, shall be distributed. They disclose a well defined policy upon that point. They apply to personal property and choses in action of every description not actually and finally disposed of by the intestate in his lifetime in some mode recognized by the law, and they permit no other disposition. Consequently, as there was no will nor a gift, unless a valid trust was created amounting to an actual and final disposition of the money in suit, the law steps in and directs where the money shall go.

Now, as essential to the validity of every trust, there must be four things : (1) A subject matter ; (2) A person competent to create it ; (3) One capable of holding as a trustee ; and (4) One for whose benefit the trust is held. In the present case the first three exist, but the fourth does not. The trustee might be supplied if necessary, for it is a well settled principle in equity that a trust once properly created, shall never fail for want of a trustee, and that the court can always appoint a person to execute it. But the court cannot supply a beneficiary or *cestui que trust*. Beneficiaries may be natural or artificial persons, but they must be persons in existence or capable of coming into existence under the trust. If they answer that requirement and can be ascertained and identified, it is not necessary that they should be named specifically. In general, any

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person who is capable in law of taking any interest in property, may, to the extent of his legal capacity, and no further, become entitled to the benefit of the trust. In the case at bar the beneficiaries are both dead and beyond the reach of human law. Their souls are intended as beneficiaries and the money is to be expended for masses for the repose of their souls. But the soul of one who has departed this life, is incapable of taking an interest in the property left behind, nor is it in any sense subject to the jurisdiction of any legal tribunal. A court of equity protects the rights of the living. It cannot extend its jurisdiction to beings which cannot be apprehended within the boundaries of the realm.

For the reason stated the trust sought to be created failed for want of a beneficiary. That being so, and there having been neither a gift nor a testamentary disposition, a resulting trust arises by implication of law, under the circumstances of this case, in favor of the plaintiff, as the legal representative of the husband of the donor, against the defendant, and the defendant must account.

The plaintiff is entitled to judgment declaring the invalidity of the trust and adjudging the defendant liable to account for all moneys still in his hands. As to all payments made by the defendant in good faith, he is entitled to claim protection.

Upon the question of costs counsel may be heard at the time of the settlement of the findings.

A motion was thereupon made for the settlement of findings, an allowance of costs, and for interlocutory judgment. In passing upon these questions the following further opinion was filed.

FREEDMAN, J.—To correct misapprehension as to the scope of the opinion heretofore filed by me in this case, and to prevent misunderstanding hereafter, I re-state the position taken by me.

In entering upon the discussion of the questions relating to the validity of the disposition made by Mrs. Gilman of

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her money, I commenced by pointing out that according to the law of England *every* disposition of property, real and personal, for the purpose of having masses said, etc., though in form the title is passed, is held void by the courts of that country; namely, a disposition of *real* property by force of certain statutes directed against so called superstitious uses, and a disposition of *personal* property upon general principles of public policy enforced by the courts.

I then held that in the United States there is no such statute or policy, and that such a policy should not be adopted by the courts.

If, therefore, Mrs. Gilman had made a will and bequeathed her money to her executor for the purpose of having masses said for the repose of her soul or that of her husband or both, or to a particular church or priest for such purpose, I would certainly have upheld the bequest, because under the testamentary disposition the title would have passed. So if in her lifetime she had given the money absolutely to a particular church or priest with the request to have masses said, I should not have hesitated to uphold the gift, because the title would have passed. So if she had given the money to the defendant in this action in such a way that the title passed to him unconditionally and beyond recall, and merely requested him to have masses said, but left it to him whether he would do it or not, I would still have upheld the gift. But she did none of these things. She attempted to create a trust by parol instructions, and a bare delivery pursuant to such instructions, and yet retain the title to the money. The defendant, who is an undertaker, was to have no interest or benefit in it.

In discussing this *supposed* trust and noticing the points of counsel made in *this* connection, I showed that, though it was not a trust for a charitable use, nor a trust for a pious use, within the meaning of these terms as known to the law of trusts, the purpose of the trust,—viz., to have masses said, was nevertheless open to *no* legal objection,—but that the difficulty was that the *supposed* trust was no

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trust at all which the law can recognize, because there was no longer any person in existence or capable of coming into existence under the trust that could call the alleged trustee to an account in a legal tribunal, if he should refuse to execute the trust and convert the money to his own use. I should have added here as an additional reason why it was no trust at all, that there had been no gift or other disposition by which the title passed, for every trust must be founded upon such a gift or disposition. But as I had previously disposed of that question, I supposed the reiteration was unnecessary.

It therefore will be seen that the case really came down to this: No title passed by either a bequest or gift or legal trust. There was only a mere naked deposit of money into the hands of an agent with certain instructions concerning the employment and payment from time to time of a third person, namely, a Catholic priest, for services to be rendered. In such a case it is a fundamental principle of the law of this state that the principal may at any time revoke the instructions and recover his property, and that, if he does not do so in his lifetime and dies intestate, his death revokes the authority of the agent, and that, as the title must go somewhere, it goes to the administrator of the intestate. In such a case the character of the instructions is wholly immaterial. From the moment the administrator objects, the agent must cease paying out. He can no more pay for the erection of monuments than he can pay for having masses said. But up to that time he will be protected for acts done in good faith.

Thus it will be seen that if, instead of calling for the saying of masses, the instructions of Mrs. Gilman had been that the defendant, as her agent, should from time to time, employ and pay a suitable person to hoist the American flag on the 4th day of July in each and every year over the house in which she died, I would have been bound to render precisely the same decision which I did render.

The findings submitted are settled in strict conformity with these views and the interlocutory judgment to be en-

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tered must also correspond therewith. As to all acts done by the defendant in good faith before the administrator demanded the money, he must be protected. But all questions arising in this connection should be determined upon the accounting.

As to costs, I can only decide at present that none are to be awarded against the defendant personally. Under the circumstances of the case, not only was he almost under a moral obligation to have his rights passed upon by a court of competent jurisdiction, but the question of plaintiff's legal capacity to sue was also a very complicated question. For these reasons, I deem it a wise exercise of the discretion vested in me not to inflict costs upon him. All other questions pertaining to costs to be paid out of the fund should stand over without prejudice until the coming in of the report upon the accounting.

In conclusion I wish to state yet that in consequence of the imperfect newspaper report which I had of the case before Judge TULEY, I referred to that case as one arising under a will. I have since ascertained, though I have not been able to procure an authentic report, that it was a case of conveyance by deed absolute upon its face which passed the title as effectually as a will would have done.

MEMORANDA
OF
CASES NOT REPORTED IN FULL.

**WILLIAM ZORNTLEIN, RESPONDENT v. GEORGE A.
BRAM, ET AL., APPELLANTS**

*Estates—tenancy by entirety does not exist.—Partition—finding that parties
are tenants in common, a sufficient finding that plaintiff was in
actual or constructive possession.*

Before SEDGWICK, Ch. J., FREEDMAN and RUSSELL, JJ.

Decided December 30, 1882.

• Appeal by defendants from a judgment directing sale of certain real estate, as asked by the complaint and that proceeds be divided, an actual partition being impossible.

The plaintiff claimed to be owner of an undivided half of the property and tenant in common with the defendants who were owners of the other undivided half as was alleged by the complaint. The plaintiff derived title by a deed of conveyance made by Babeta Bram on September 23, 1881. Babeta Bram was then the wife of Jacob Bram. Babeta Bram derived title from a deed of conveyance made on April 24, 1878, to the said Jacob Bram and Babeta his wife. On September 30, 1881, Jacob Bram and Babeta Bram, joined in a deed of conveyance of the whole of the premises to the defendant.

The court directed judgment of sale and division of proceeds. The defendant appealed, claiming that Jacob

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Bram and his wife were tenants in entirety, with right of survivorship.

The court at General Term said: "In the light of the reasoning of the opinion of Judge DANFORTH in *Meeker v. Wright* (76 N. Y. 262), the court below was correct in its judgment on this question. It should be passed on by the court of appeals."*

It was asserted that there was no finding of the fact that the plaintiff was in actual or constructive possession.

The court at General Term, said: "That is sufficiently found, by the first finding, which is that the parties to the action are tenants in common."

I. A. Englehart and *A. J. Dittenhoefer*, for appellant.

H. M. Gescheidt, for respondent.

Opinion by SEDGWICK, Ch. J.; FREEDMAN, J., concurred.

Judgment affirmed, with costs.

HORACE RUSSELL, J., wrote as follows: "I agree that the questions in this case ought to be passed on by the court of appeals. But in view of the facts that that part of Judge DANFORTH's opinion in *Meeker v. Wright*, which takes the ground that the married woman's act of 1862, has in effect overthrown the doctrine, that when real estate is conveyed to husband and wife they take as tenants of the entirety with the right of survivorship, etc., was not concurred in by a majority of the court, I do not think it a sufficient authority for a decision at variance with all the previous (and indeed subsequent) decisions of this state, and of other states having a similar statute."

* That tenancy by the entirety still exists, see *Bertles v. Nunan*, 92 N. Y. 152; and *Freel v. Buckley*, *Id.* 634.

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SARAH H. HAZEWELL, APPELLANT, v. GERSHON
H. COURSEN, RESPONDENT.

Judge's charge—that plaintiff must maintain his case by "uncontradicted evidence"—when not deemed error—when specific objection to must be made.

Before SEDGWICK, Ch. J., FREEDMAN and RUSSELL, JJ.

Decided December 30, 1882.

Appeal by plaintiff from judgment dismissing complaint with costs entered upon a verdict, in favor of defendant, and also from an order denying her motion, upon the minutes for a new trial.

Action to recover damages for the alleged conversion by the defendant of a contract for the sale and purchase of lands. The trial judge charged that "the burden of proving the plaintiff's case rests upon the plaintiff and she must establish that fact, by a preponderance of uncontradicted evidence," to which plaintiff excepted generally.

The court at General Term said, "To sustain the exception, we must suppose that the judge conveyed the notion that if the case for the plaintiff were opposed by oral testimony or by circumstances or inferences, that the plaintiff could not in any event recover. This ground could not be taken, without it also being true, that the defendant's case should not be sustained by the jury, if it were opposed in like manner. The result would be, that the judge would be of the opinion that neither party was entitled to a verdict on the merits of the respective cases, for certainly each was contradicted, in a narrow sense by the other. It is impossible to imagine that the counsel or jury took this to be the judge's meaning or opinion.

"On the whole, it seems to me that it is a case where the general purport of the charge was correct and that inadvertently a phrase was used in a peculiar way. A general exception was therefore not valid and did not call the attention of the court to the very point that is now taken.

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On such a point to make a valid exception, it should be necessary to state it specifically to the court."

Luther R. Marsh, for appellant.

John E. Burrill, for respondent.

Opinion by SEDGWICK, Ch. J. ; FREEDMAN and RUSSELL, JJ., concurred.

Judgment affirmed with costs and order appealed from affirmed, with \$10 costs.

ANDERSON FOWLER, RESPONDENT, v. JOEL O.
STEVENS, APPELLANT.

Lease.— Warranty that premises are habitable, when not to be deemed warranty that they will so continue.

Before FREEDMAN and RUSSELL, JJ.

Decided December 30, 1882.

Exceptions ordered to be heard in the first instance at the General Term, upon the direction of a verdict for the plaintiff.

The action was for the recovery of rent, the answer alleged breach of the plaintiff's warranty that the premises should be fit for habitation as a tenement for the defendant and his family ; and counter-claimed for moneys alleged to have been expended by reason of sickness to the defendant and his family, incurred from the uninhabitable condition of the house. The defendant testified that in the spring of 1875, before he leased the house, he inquired of the plaintiff about it, and that the plaintiff said "it was a new house in perfect order and in every way in a habitable condition ;" and that relying upon that statement he took it. The defendant's evidence tended to show that in the latter part of the summer, he having gone into occupation of the house on the 1st of May, 1875, foul smells became

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very perceptible, and his wife was taken very ill, and that whenever there was a rain storm of any duration, the water would rise within three or four feet of the furnace with the register almost red hot, and that the walls of the rooms of the house were dripping with water. By another witness he showed that this house was built upon made ground where there had formerly been a pond. A physician testified that the defendant's illness and that of his wife, was due to their living in this house.

The court at General Term said, "The general proposition that the parol statement by the plaintiff or his agent that the house was 'a new one in perfect order and in every way in a habitable condition' amounted to a warranty, or enough to permit a jury to find a warranty, may be conceded without disturbing the judgment in this case. It cannot be claimed that the warranty extended beyond the condition of the house at the time of letting. It was not a warranty, as claimed in the complaint, that the house would continue habitable. All the evidence as to the uninhabitable condition of the house relates to a period long subsequent to the letting. Granting that the house was erected upon made land where a pond had formerly been, it does not appear that that fact, or any other, made it uninhabitable at the time the defendant went into possession. Nor does it appear with clearness that that fact can be assigned as the reason why the premises became uninhabitable afterwards. That is to say, the evidence does not exclude other causes for the effects shown. We are, therefore, of opinion that the defense and counter-claim was not sustained by the evidence and was properly dismissed."

A Kling, for appellants.

W. F. McRae, for respondent.

Opinion by RUSSELL, J.; FREEDMAN, J., concurred.

Exceptions overruled, judgment affirmed, with costs.

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GEORGE W. VENABLE, APPELLANT, v. THE N. Y.
BOWERY FIRE INSURANCE Co., RESPONDENT.

*Interpleader—motions for depend upon same principles as actions for.—
Attachment creditor not in position to attack title of assignee of
his debtor to chose in action.*

Before SEDGWICK, Ch. J., and RUSSELL, J.

Decided December 30, 1882.

Appeal from an order granting an application made by the defendant to substitute one Schlessinger an attaching creditor in its place and discharge it from liability, upon payment into court of the sum claimed in the complaint.

The action was brought to recover on a policy of insurance, covering furniture, &c., in a house at Saratoga Springs, issued by the defendant to one Gustav B. Salfield. The loss occurred April 22, 1882. The policy of insurance was assigned by the insured to Olga Salfield April 27, 1882. An order of attachment in a suit by Schlessinger against Gustav B. Salfield, was served on the defendant's agent April 28 or 29, 1882. Judgment in that action for \$1,630.94 was recovered and docketed in Saratoga county on July 20, 1882. Olga Salfield assigned the policy of insurance to the plaintiffs on May 17, 1882, and on May 18, Gustav B. Salfield assigned to the plaintiff all causes of action and rights of action and all money due and to grow due on the policy." This action was begun September 16, 1882. Before the time for answering expired, and on October 3, the defendant made this motion of interpleader. The motion was granted and the money has been paid into court.

The court at General Term said: "It is well established that motions for interpleader depend upon the same principles as actions of interpleader, and that where an action of interpleader could not be maintained an order ought not to be made. An attachment creditor is not in position to assail, in any form of action the title of an assignee of his debtor to choses in action. Only an execution creditor

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can do that. If any doubt remained in regard to this doctrine after its announcement in *Thurber v. Blanck* (50 *N. Y.* 80), arising from the fact that the commission of appeals had at about the same time, reached a contrary conclusion (*The Mechanics' and Traders' Bank v. Dakin*, 51 *N. Y.* 519), that doubt has been set at rest by the decision in 8 *Hun*, 431, affirming a dismissal of the complaint in *Mechanics' Bank v. Dakin*, on the ground that the decision of the court of appeals was controlling; and by the re-affirmance of the doctrine of *Thurber v. Blanck*, in *Castle v. Lewis* (78 *N. Y.* 131). These cases were not called to the attention of the learned judge who made the order appealed from."

A. R. Dyett, for appellant.

M. S. Thompson, for respondent.

J. Ullman, for Schlessinger.

Opinion by RUSSELL, J.; SEDGWICK, Ch. J., concurred.

Order reversed, with costs.

THE NATIONAL ICE COMPANY, APPELLANT, v.
WILLIAM I. PRESTON, RESPONDENT.

Agreement between A. and B. to supply B. malt to be manufactured into beer for A.'s benefit, A. to be paid with moneys realized from sales of beer; agreement accompanied by chattel mortgage on B.'s property; does not constitute agency as to third parties, e. g., persons who supplied ice to B. for use in business.—When such agreement not fraudulent, though chattel mortgage be not filed.

Before SEDGWICK, Ch. J., ARNOUX, J.

Decided December 30, 1882.

Appeal from judgment discussing plaintiff's complaint.

Action to recover the value of certain ice sold and delivered by plaintiff to one Newman. Defendant and Newman

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had entered into a contract by which defendant supplied Newman with malt which he was to manufacture into beer and sell for defendant's account and pay defendant from the moneys so realized for the materials furnished. Newman executed and delivered a chattel mortgage upon all his personal property to secure defendant. This mortgage was not filed until after plaintiff's claim had accrued. Plaintiff claimed to recover herein against defendant as undisclosed principal, and as having conspired to cheat and defraud plaintiff.

The court at General Term said: "It is perfectly well settled by numerous decisions that a contract of the character set forth in the complaint and above mentioned, does not establish the relation of principal and agent, as to third parties, or entitle a creditor of the manufacturer to make any claim against the owner of the supplies (*Mallory v. Willis*, 4 *N. Y.* 76; *Foster v. Pettibone*, 7 *Id.* 133; *Wood v. Orser*, 25 *Id.* 348)."

"If the complaint is viewed as stating a cause of action for fraud, the plaintiff has not succeeded in establishing a case. Fraud can never be presumed. It must be proven. There was no duty upon Newman to disclose his circumstances. If the plaintiff trusted him without inquiry it was at their own peril.

"Nor was there any obligation on the defendants part as to plaintiff to file his chattel mortgage. Our statutes fix his liability for such neglect, and he took the risk that they impose. The complaint alleges that there was a fraudulent purpose to give Newman a fictitious credit and in pursuance thereof he purposely did not file his mortgage. In preparing this pleading the learned counsel for plaintiff recognized that the failure to record was not the fraud, but the agreement out of which this failure sprung he claims was a fraud.

"In this he is supported by authority, but the difficulty in his case is that he has failed to establish any such agreement.

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Blumenstiel & Hirsch, and A. J. Requier, for appellant.

B. F. Tracy and Henry Brodhead, for respondent.

Opinion by ARNOUX, J.; SEDGWICK, Ch. J., wrote: "I am of opinion that plaintiff showed no cause of action, and concur with Judge ARNOUX."

Judgment affirmed, with costs.

HENRY CHAMBERLAIN, RESPONDENT, v. ALFRED
BRADY, APPELLANT.

Real estate.—Damages.—Architects' fees paid, when not proper damages for breach of contract to convey premises.—Verdict—when may be corrected by court.

Before SEDGWICK, Ch. J., and RUSSELL, J.

Decided December 30, 1882.

Appeal by defendant from judgment entered on a verdict directed for plaintiff at trial term.

Appeal by defendant, from order amending the verdict directed, by increasing the amount of it.

This suit was instituted by the plaintiff to recover \$5,000 paid by him to the defendant February 3, 1881, upon (and to obtain) a contract for a conveyance, to be delivered upon the fifth of the following May, of certain real property in this city, the expenses of searching title (\$58.55) and \$600 expense incurred for architect's plan of a building proposed to be erected by plaintiff upon the premises in question; with interest upon the several items, defendant having been guilty of a breach of the contract on his part.

As part of the damages, the plaintiff was allowed \$659, as the amount due by him to an architect whom he had employed to make plans for a building to be erected on the premises to be conveyed by defendant under the contract and in anticipation of the performance of the contract.

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The court at General Term said : "The contract did not contemplate that the plaintiff should prepare to build as if he were owner before he became owner. It left him, until its promised performance, without the title or power or interests of owner. The expense, therefore, was not within the contemplation of the parties, at the time of making the contract. Nor was the expense an ordinary or anticipated consequence of the making of the contract. This amount should therefore be deducted from the amount of the verdict and the judgment should be modified in accordance. As modified the judgment should be affirmed without costs of the appeal to either party.

"As the jury gave the amount of the verdict directed as a formal matter it was within the power of the court afterwards to correct the error in the addition, that had been made at the time of the verdict. The order appealed from should be affirmed with \$10 costs."

George H. Forster, for appellant.

Stanlay & Clark and *Edwin B. Smith*, for respondent.

Opinion PER CURIAM.

THE TWENTY-THIRD STREET RAILWAY Co.,
RESPONDENT, v. THE BAY RIDGE
FERRY Co., APPELLANT.

Pleading.—False representations.—Statements as to thing sold known to both parties—effect of.

Before SEDGWICK, TRUAX and O'GORMAN, JJ.

Decided February 5, 1883.

Appeal by defendant, from judgment in favor of plaintiff, entered upon a verdict directed by court upon the pleadings. The complaint alleged that the plaintiff agreed to let a certain dock to the defendant, for a certain season, in consideration of the sum of one thousand dollars, and the

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defendant agreed to hire said dock and to pay therefor the sum of one thousand dollars, and that the defendant took possession of said dock and had not paid the said sum of one thousand dollars, although often requested, etc. The answer admitted the making of the agreement, but alleged that the dock was of no use to the defendant for reasons alleged in the answer. The answer further alleged that defendant had not taken possession of and used said dock, in pursuance of the agreement, as averred by the complaint. By way of counter-claim, it further alleged, that at and before the making of the agreement the plaintiff, by its agents represented that the dock was in all respects easy of access and a desirable dock for the defendant, and that the same could readily and easily be used by the defendant, in its business, which was known to the plaintiff, of receiving and landing passengers by steamers named "Norwalk" and "Martin;" that in fact the defendant was unable to use the dock, as plaintiff's agent had represented it could be used, and said dock was not desirable, as plaintiff's agent had represented it was, and it was not a dock from which defendant could receive and land passengers by said steamers. The reply denied the allegation of the counter-claim.

The court at General Term, said: "The action was in substance upon a promise to pay one thousand dollars. The answer did not show that this promise was not binding for want of consideration. It was immaterial whether the defendant took or did not take possession of the dock. If it did not, it chose not to enjoy an advantage which the agreement gave. As shown by Judge FREEDMAN, on the trial, the answer did not state any case for a recoupment of damages, or for false representations. The alleged representations concerned the opinion of plaintiff's agents as to the bearing of facts, the existence or non-existence of which, was known or to be learned, by both parties equally."

Alfred C. Chapin, for appellant.

Robinson, Scribner & Bright, for respondent.

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Opinion by SEDGWICK, Ch. J. ; TRUAX and O'GORMAN, JJ., concurred.

Judgment affirmed, with costs.

IN THE MATTER OF ROBERT E. DUNHAM.

Costs—in sound discretion of court in special proceedings—Code Civ. Pro.
§§ 3230, 3240.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 5, 1883.

This is an appeal taken by the New England Mutual Life Insurance Company from so much of an order as denied costs to appellant, on denying prayer of petitioner.

In September, 1881, the Odd Fellows' Hall Association in the city of New York sold out all their property real and personal, and ceased to transact any business.

Dunham, a stockholder in the association, petitioned that he be paid his distributive share of the assets of the association out of its funds in the trust company on giving a bond for its return should the contingency arise of a certain mortgage (its only liability) being foreclosed and a deficiency remain which the association might be called on to meet. The association demurred to the petition and the New England Mutual Life Insurance Co. answered it. The court gave the petitioner liberty to withdraw his petition or if he elected, the petition might be denied, but without costs. As an order was entered denying the petition without costs and from that part of the order the New England Mutual Life Insurance Company appeals.

The court at General Term said: "The sections of the Code of Civil Procedure, 3230 and 3240 leave the question of awarding or denying costs in proceedings of this nature to the discretion of the court. The discretion contemplated by the law is not a mere unreflecting caprice exercised in violation of right but a judicial discretion to be used ac-

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according to the rules of law and equity. We do not find that this principle of law has been violated by the order appealed from in this case.”

Roger Foster, for appellant.

Charles A. Jackson, for respondent.

Opinion by O’GORMAN, J.; SEDGWICK, Ch. J., and TRUAX, J., concurred.

Order affirmed, without costs.

HERMAN ROSENBERG, ET AL., RESPONDENTS, v.
HUGO BLOCK, ET AL., APPELLANTS.

Agents.—Arrest.—Commission merchants not liable for conversion for failure to turn over specific proceeds.

Before SEDGWICK, Ch. J., and O’GORMAN, J.

Decided February 5, 1883.

Appeal from order denying a motion to vacate an order of arrest.

Action for conversion; the ground of arrest was the same. The papers showed that the defendants, commission merchants in the city of New York, received from the plaintiffs merchandise upon the agreement that defendants would sell the same as agents for the plaintiffs and remit the proceeds of sales to them; that the defendants did sell said merchandise to the amount of about \$800, but did not remit the proceeds, but refuse to pay the same.

The court at General Term, said: “The allegation in the complaint that the defendants “unlawfully and wrongfully and with intent to defraud the plaintiffs, converted the same to their own use,” cannot be regarded as a statement of facts of the truth of which plaintiffs could have knowledge, but rather as a legal conclusion from the facts which they had averred (*Greentree v. Rosenstock*, 61 N. Y. 583).

“The mere fact, that the defendant was an agent to sell

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and receive the proceeds does not make him liable for a tort, in case he does not pay over the proceeds on demand, after those proceeds have passed from the specific form in which they were received, and have been commingled with the agents own money. The duty of an agent for sale is to account for the proceeds of his principal's property ; but he is not guilty of a conversion, if he does not deliver the specific proceeds to his principal (Robbins v. Falconer, 43 Super. Ct. 363)."

S. W. Weiss, for appellants.

Theron G. Strong, for respondents.

Opinion by O'GORMAN, J.—Order appealed from reversed with \$10 costs, and the order of arrest vacated with \$10 costs.

SEDGWICK, Ch. J.—“I concur on the ground that the papers did not show that the defendants had received the proceeds of the goods or how much they were.”

THOMAS MURTHA, RESPONDENT, v. MICHAEL CURLEY, IMPLEADED, &C., APPELLANT.

Costs.—Where plaintiff on entry of judgment is entitled to costs, and general term reverses judgment, “costs to appellant to abide event,” and court of appeals affirms original judgment “with costs,” such latter phrase refers only to costs in court of appeals.*

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 5, 1883.

Appeal from an order directing the clerk to tax certain costs.

The plaintiff obtained on the trial of the action a judgment against the defendants for a certain sum of money. From this judgment the defendant Curley appealed to the general term of this court, which reversed the judgment of

* Reversed, 92 N. Y. 859.

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the court below with costs of appeal to the appellant to abide the event of a new trial. The plaintiff appealed to the court of appeals.

The order of the general term of this court was reversed by the court of appeals and the judgment of the trial term was affirmed with costs to the plaintiff. The plaintiff then presented his bill of costs for taxation to the clerk, who refused to tax the costs of the general term in favor of the plaintiff. The plaintiff then moved at special term for a re-taxation of said costs, and the special term made an order directing the clerk to allow to the plaintiff the costs of the general term.

The court at General Term, said: "The order of the general term limited the recovery of the costs of the general term to the defendant Curley, who was the successful party on the appeal to the general term, and he was to recover the costs of the general term only in the event that he should finally succeed in the action. The general term had the power to reverse the judgment with costs to abide the event, in which event, the party finally succeeding in the action should have been entitled to tax the costs of an appeal or trial at which we had been beaten. (*First Natl. Bk. v. Fourth Natl. Bk.*, 84 *N. Y.* 469). The costs to be awarded upon the granting of a new trial are in the discretion of the general term, and may be awarded to either party absolutely, or to abide the event (*Code Civ. Proc.* § 3238). In this case, the general term saw fit to award the costs of the appeal to the defendant Curley. It did not award them to the plaintiff. The plaintiff could not have them in any event because he did not maintain the judgment in his favor (*Howell v. Van Siclin*, 8 *Hun*, 524). It is true that the court of appeals reversed the judgment of the general term "with costs," but the words "with costs" in the order of the court of appeals mean, the costs in that court (*Sisters of Charity v. Kelly*, 68 *N. Y.* 628).

Starr & Hooker, for appellant.

A. D. Pape and *H. D. Burnett*, for respondent.

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Opinion by TRUAX, J. ; SEDGWICK, Ch. J., and O'GORMAN, J., concurred.

Order of special term reversed with \$10 costs, and taxation of the clerk affirmed.

LOUIS SANDERS, RESPONDENT, v. FREDERICK
SIEBERT, APPELLANT.

Arrest.—*Allegations of false representations when sufficient to sustain orders.*
—*Complaint, when may be treated as affidavit though irregularly verified.*

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 5, 1888.

Appeal from an order denying a motion to vacate an order of arrest, which motion was made upon the papers upon which the order was granted.

The papers show that the defendant obtained from the plaintiff certain goods by falsely and fraudulently representing that two orders which he presented to the plaintiff and which purported to have been signed by one Westervelt, were genuine, although the defendant had himself without the knowledge or consent of said Westervelt signed said Westervelt's name to said order, with the intent to deceive and defraud the plaintiff, and that the plaintiff was deceived and defrauded thereby.

The court at General Term said: "This established a *prima facie* case sufficient to warrant the issuing of an order of arrest.

"The complaint was verified as an affidavit and also with the usual verification 'except as to those matters,' etc., and no allegation material to the charge of fraud and deceit was stated upon information and belief. The complaint may be regarded as an affidavit for the purpose of procuring the order of arrest (*Palmer v. Hussey*, 59 *N. Y.* 647)."

Herman Stiefel, for appellant.

Simon H. Stern, for respondent.

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Opinion by TRUAX, J.; SEDGWICK, Ch. J., and O'GORMAN, J., concurred.

Order appealed from affirmed with \$10 costs.

CYRUS BUTLER, RESPONDENT, v. JOHN SMALLEY,
ET AL., APPELLANTS.

Manufacturing corporations—liability of trustees for failure to file report and for filing false report—nature of—may be enforced in same action.—Construction of statute.—Intent.

Before SEDGWICK, Ch. J., TRUAX and O'GORMAN, JJ.

Decided February 5, 1883.

Appeal by defendant from judgment in favor of plaintiff entered on report of referee.

Action to recover \$1,705, and interest, the amount of an indebtedness to the plaintiff of the Lathrop Anti-Frictionate Company, a manufacturing corporation formed under the act of 1848, upon the grounds: 1. That the defendants as trustees of said company failed to file the annual report as required by the 12th section of the said act; 2. That the defendants as officers of the said company made and signed a report false in a material representation, to wit, as to the amount of the existing debts of the company.

The case was referred to Israel Minor, Jr., who wrote as follows:

“The two causes, one for failing to file an annual report in compliance with § 12 of the act of February 17, 1848, and the other for making a false report in violation of § 15 of that act, are not necessarily inconsistent and are properly joined in one complaint (*Bonnell v. Wheeler*, 1 *Hun*, 332). It is not necessary, in order to render the defendants liable under § 12 of the act, that failure to make and publish should concur with failure to file the annual report. The failure to file is of itself a sufficient violation of the act to subject them to the penalty (*Gildersleeve v. Dixon*, 6 *Daly*,

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76). The construction given to § 12 of the act by the court of appeals in *Cameron v. Seaman* (69 *N. Y.* 396), is that the twenty days mentioned in the statute, applies only to the act of making, that is, preparing, signing and verifying the report, for which twenty days from the first day of January are allowed, and not to the acts of publishing or filing; that these acts are necessarily subsequent to that of making; that the time for publishing and filing are not expressly fixed, but that in the absence of an express provision on the subject, the law implies that the filing and publishing must be within a reasonable time after the twenty days, and that this requirement, in view of the object of the statute, can only be satisfied by prompt performance and diligent action on the part of the trustees. In the case last cited the report was prepared, signed and verified January 20, and on the same day mailed to the county clerk, who filed it on the 21st, and the 21st, the first day after the expiration of the twenty days the trustees sent it to a newspaper for publication, which published it on the 24th. This was held a compliance with the statute and the trustees were exonerated from liability.

“In the present case, though the report was made and published within the twenty days, no attempt was made to place it on file until February 13, a lapse of twenty-four days after the expiration of the twenty days allowed by statute for making the report. No obstacle to filing intervened, nor is any reasonable excuse offered for the delay. This certainly shows neither the prompt performance nor the diligent action on the part of the trustees required by the statute. There is here no opportunity for making such a construction as to relieve the trustees. If the delay of twenty-four days in filing is excusable, why not an indefinite period; why not, indeed, an entire failure to file?

“It is urged by defendants' counsel that the neglect to file must be shown to be fraudulent; that *mala fides* on the part of the trustees must be shown. In some of the states, the legislatures have made the liability of trustees in such cases, dependent upon their intention. This is not, how-

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ever, an element of our statute, and the trustees cannot be excused by reason of failure to prove an intentional evasion or violation of the statute.”

The referee upon consideration of the testimony held defendants liable under § 15 of the act.

The following memorandum was delivered at general term :

PER CURIAM.—“ Judgment affirmed with costs on report of referee.”

Winsor & Marsh, for appellants.

Frank A. Irish, for respondent.

HENRY E. P. ADAMSON, ET AL., RESPONDENTS, v.
JAMES W. ELWELL, APPELLANT.

Agency—undisclosed principal—execution of instrument by agent, when sufficient in form.

Before SEDGWICK, Ch. J., TRUAX and O’GORMAN, JJ.

Decided February 5, 1883.

Appeal by the defendant, from a judgment entered upon the report of Hon. Joseph S. Bosworth, referee to hear and determine.

The action was brought by the plaintiffs, as owners of the steamship “Egbert” upon a charter-party for a voyage from New York to Havre, France.

The principal question litigated on the trial was the validity of the charter-party as against the defendants. It was executed on behalf of defendants, by their agents, Charles T. Russell & Co. in Liverpool, while the vessel was lying in that port, in pursuance of cable authority from the defendants, which authority is referred to in the signature to the instrument.

The referee wrote as follows : “ Cobb v. Knapp (71 N. Y. 348), without reference to other authorities, is conclusive against the defendants, that not having disclosed their prin-

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ciples (if they had any), they are personally liable, if the charter party as executed, was authorized by the cablegram, and if it is executed in such form as to make the defendants parties to it as contracting parties. . . . I think the charter is in form one that binds the defendants as principals. It is signed,

“Adamson & Short, by their agents, Stoddart Bros.

“By cable authority from J. W. Elwell & Co., of New York, C. T. Russell & Co., agents.”

“This should be read as if the ‘cable authority’ were annexed to the charter party. It would thus unmistakably appear that the defendants were included as the principals of the one part, who executed it by C. T. Russell & Co., as their agents. The instrument commences thus: ‘Liverpool, 29th Aug., 1877. It is this day mutually agreed, between Messrs. Adamson & Short, procuring of the good ship or vessel called the “Egbert,” . . . of the one part, and J. W. Elwell & Co., of New York, and C. T. Russell & Co., of Liverpool, agents, merchants and charterers, of the other part.’ Assuming that this instrument should be read as if the character ‘&’ was not written between the names of the defendants and the names of C. T. Russell & Co., then a very natural construction of it would be that it states ‘J. W. Elwell & Co.’ to be the party ‘of the other part,’ and C. T. Russell & Co. to be acting as their agents. If it is to be read with the character ‘&’ in it, then it describes the party of the second or ‘other part’ to be J. W. Elwell & Co., and C. T. Russell & Co., agents. Even thus read, it is not a forced construction to regard the word ‘agents’ as applying only to C. T. Russell & Co. They signed as ‘agents’ of J. W. Elwell & Co., by virtue of authority to do so, conferred on them by cablegram from J. W. Elwell & Co. The words ‘*merchant*’ and ‘*charterer*’ are *printed* on the blank form here used. The blank form thus used being filled up and leaving these printed words in it, would describe any charterer as ‘merchant’ and ‘charterer,’ whatever his occupation might be. If it can be held that C. T. Russell & Co.

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have so executed the charter party as to make them joint principals with the defendants as charterers, the objection appears on the face of the complaint, as a copy of the instrument is made part of it. The omission to demur to the complaint waives such a defect of parties. Code, §§ 488 and 498, 499.”

Benedict Taft & Benedict, for appellants.

James K. Hill, Wing & Shoudy, for respondents.

PER CURIAM.—Judgment affirmed, with costs, upon opinion of referee.

THOMAS MADDOCK, RESPONDENT, v. LIVINGSTON
B. VAN KLEECK, ET AL., APPELLANTS.

Appeal from judgment only does not bring up decision of special term sustaining demurrer to answer.—Counterclaim—rule as to.

Before SEDGWICK, Ch. J., TRUAX and O’GORMAN, JJ.

Decided February 19, 1883.

Appeal from a judgment entered upon an order sustaining a demurrer to the answer. The order gave the defendants leave to amend within twenty days on payment of costs. The defendants did not avail themselves of this, and plaintiff entered judgment sustaining the demurrer and for the amount demanded in this complaint with costs. The notice of appeal does not specify that the order sustaining the demurrer was also appealed from.

The court at General Term said, “The appeal from the final judgment does not bring up for review the decision of the court below made on the demurrer (*Boreel v. Lawton*, 47 *Super. Ct.* 558, affirmed in court of appeals). As the judgment entered conforms to the order directing its entry, and as the notice of appeal does not ask for a review of that order the judgment must be affirmed on the merits; assuming that the defendants have a right of action it does not

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arise out of the contract or transaction set forth in the complaint at the foundation of the plaintiff's claim, is not connected with the subject of the action and is not a cause of action on contract. It could not, therefore, be the subject of a counter-claim (*Boreel v. Lawton*, 15 *Week. Dig.* 429)."

William C. De Witt, and *B. F. Tracy*, for appellants.

Jennings & Russell, for respondent.

Opinion PER CURIAM.

Judgment affirmed, with costs.

JOHN M. CANDA, ET AL., RESPONDENTS, v. JACOB
WICK, JR., APPELLANT.

Damages. — Breach of contract to accept goods. — Evidence that plaintiff received for the unaccepted goods a higher price from a third party, when not admissible.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 9, 1883.

Appeal by defendant from judgment in favor of plaintiff, entered upon report of referee.

The second cause of action set forth in the complaint is against the defendant for a breach of contract arising out of the failure of the defendant to receive a quantity of brick duly tendered pursuant to a sale and purchase thereof.

The court at General Term, said: "The counsel argues that the referee erroneously excluded questions by defendant calculated to call for proof that the plaintiff in fact sold the brick, which he tendered under defendant's contract, at a higher price than was provided to be paid by that contract, so that there was no loss. The plaintiff of whom as a witness these questions had been asked, did not testify that he sold these bricks after their non-acceptance

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by the defendant, but that he had made deliveries of them under contracts already made with other parties. The defendant was not permitted to show what prices he would receive under these contracts. This was correct, for admitting that the prices were higher in those contracts than in this, the plaintiff would be damaged by the breach of this, inasmuch as they would be entitled to the benefits of the performance of all the contracts. There would be indeed a question as to whether the plaintiff could have performed the other contracts, unless they used the bricks they were to deliver under the present contract. This was not presented upon the trial, to the referee, or in any way brought to the attention of the plaintiff."

Lindsay & McAdam, for appellant.

Cozans & Shepard, for respondents.

Opinion by SEDGWICK, Ch. J. ; O'GORMAN and INGRAHAM, JJ., concurred.

Judgment affirmed, with costs.

THE NASSAU BANK, APPELLANT, v. JOHN J. JONES,
ET AL., EX'RS. &C., RESPONDENTS.

Ultra vires.—Contract by director to make in his own name investment beyond power of bank—when not enforceable.

Before O'GORMAN and INGRAHAM, JJ.

Decided April 9, 1883.

Appeal by plaintiff from a judgment at Special Term, dismissing the complaint.

The action was to hold the executors of David Jones, deceased, liable for profits alleged to have occurred from an investment in bonds of a certain railroad company, for which said Jones agreed with the officers of the plaintiff to subscribe, in his own name, but as agent of the Bank, and for its benefit.

Opinion of O'GORMAN, J.

The trial judge held that the transaction was not in any aspect a banking loan or within legitimate banking powers, as specified in chapter 260 Laws of 1838, page 249. Appellants claimed that the objection that the subscription for the bonds of said railway company was beyond the powers of the bank, was not open to Jones or his executors.

No money was paid out by plaintiff and no loss was incurred. —

The court at General Term distinguished *Pratt v. Short* (79 N. Y. 437), in which a deposit and savings institution had discounted a note payable to the order of defendant, the corporation being authorized by law to loan its capital and funds, but not on the security of commercial paper, and it was held that, although the security taken on the discount was void, the money loaned could be recovered.

The court at General Term, further, said: "This, however, is not the position of the case at bar. Here, the effort of the plaintiff is to *enforce an illegal contract*, not to recover money paid under it, which the borrower is bound in equity to repay. There is no analogy between the cases."

Martin & Smith, for appellant.

Martin & Keogh, for respondents.

Opinion by O'GORMAN, J.; INGRAHAM, J., concurred in result.

Judgment affirmed, with costs.

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JULIET B. LOCKWOOD, APPELLANT v. WILLIAM M. HOUSE, RESPONDENT.

Waiver—statement in sworn proof claim in bankruptcy that claim is not secured, is waiver of the security,—e. g., a deed—only as to so much of indebtedness as is mentioned in claim.—Privileged communication—counsel who draws proof claim in bankruptcy cannot be compelled to testify as to it—waiver of privilege.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided April 9, 1883.

Appeal from a judgment entered on report of referee.

Action to recover possession of a deed of certain real property, which deed was claimed to have been delivered by plaintiff to defendant for safe keeping.

The property in question was owned by the husband of the plaintiff and was by him and plaintiff conveyed to the defendant House, by a deed, the consideration being therein stated as one dollar.

Subsequently a deed was signed and acknowledged by the defendant House and wife which purported to convey to the plaintiff the same property for the same consideration, and the action is brought to recover possession of this deed as executed. It appeared that said deed had been executed but never delivered. And that the property in question was conveyed by plaintiff and her husband to defendant as security for certain moneys owing by plaintiff's husband to defendant or to his firm, and which were still unpaid.

Plaintiff claimed that because defendant proved his claim against the estate of plaintiff's husband in bankruptcy, and in the proof of debt which is verified by defendant, it was stated that he had no security; defendant is estopped by that proof of debt from claiming that he holds this property as security for any debt due him.

The court at General Term, said: "The answer to that position is that the proof of debt is for one note of \$500 only and refers only to that note. The evidence shows

Opinion of INGRAHAM, J.

that Lockwood (plaintiff's husband) was indebted to defendant in a large sum amounting to several thousand dollars, besides the note of \$500, which was proved a debt in the bankruptcy proceedings. If defendant was willing to waive his security for that portion of his claim he had a right to do so, and that would not be an abandonment of his security for the residue of the amount due to defendant or to his firm. Judgment should therefore be affirmed unless there was error in the reception or rejection of evidence. The only exceptions insisted on by plaintiff's counsel on the argument was to the exclusion of the testimony of Mr. Fay, who was the attorney for the defendant in the proceedings in bankruptcy. The witness was asked to testify as to a conversation between himself and defendant, when defendant instructed the witness to prepare the proof of debt in the bankruptcy proceedings. The witness was allowed to answer the questions as to what was said on the subject of security, but was not allowed to testify as to the remainder of the conversation that occurred, on the ground that the communication was a privileged communication from a client to his attorney. I do not think that the evidence was competent, and it was properly excluded (*Root v. Wright*, 84 *N. Y.* 72).

"The appellant insists, however, that as the defendant had testified as to what took place at the interview referred to, when he was examined as a witness, he thereby waived the privilege, and plaintiff should have been allowed to prove what happened at that time, but an examination of the testimony of the defendant will show that the account given by the defendant of the interview in question was in response to questions asked him by the plaintiff on cross-examination, and plaintiff made him for that purpose his witness."

J. H. Parsons and *T. F. Sanxay*, for appellant.

N. Quackenbos and *A. Cardozo*, for respondent.

Opinion by INGRAHAM, J. ; SEDGWICK, Ch. J., and O'GORMAN, J., concurred.

Judgment affirmed, with costs.

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MARY C. RANK, RESPONDENT, v. AUGUSTUS H. GROTE, ET AL., IMPLEADED, APPELLANTS.

Pleading—duplication of cause of action in ejectment by stating two sources of title—when not objectionable.—Indefiniteness and redundancy, rule as to.

Before SEDGWICK, Ch. J., and INGRAHAM, J.

Decided May 16, 1883.

Appeal by defendant from order denying his motion to strike out portion of the complaint as irrelevant, other portions as redundant, or that the same be made more definite and certain, or that the plaintiff be compelled to elect which cause of action he will prosecute.

The action was in the nature of ejectment. As a first cause of action plaintiff stated her title to be that of an heir at law of the former owner. As a second cause of action, she states her title to be that of devisee of the former owner. The statements in other respects, as to the cause of action, are similar, and are sufficient in such an action. The motion was to strike out, as irrelevant or redundant, the statement of the sources of title, and to compel the plaintiff make a statement of a single cause of action.

The court at General Term, said: "The appellant is not aggrieved by the order below, for his preparation for trial would necessarily be the same, whether the amendments demanded were or were not made. He, if the superfluous matter were stricken out, would be forced to be prepared for any title the plaintiff might rest on, as heir or as devisee. The duplication of the causes of action does not lead to confusion or obscurity or additional labor.

"The order must be affirmed, but, as the pleading in the complaint is unusual and naturally led to the motion, without costs."

G. W. Cotterill, for appellants.

Redfield, Hill & Lydecker, for respondent.

Opinion PER CURIAM.

Order affirmed, without costs.

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NEIL HARDEN v. THE NEW YORK CENTRAL &
HUDSON R. R. Co.

Negligence.—Duty to public of railroad company occupying pier with elevated platform for cars, etc., without guards or lights. —Respective liabilities of railroad company and consignee, using pier for unloading cargo, for injuries to employee of consignee falling from such platform.—Contributory negligence of such employees.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided June 2, 1888.

Motion by defendants for a new trial upon exceptions ordered to be heard in the first instance at general term ; verdict directed for plaintiff.

The action was for damages, from injury to plaintiff alleged to have been caused by defendant's negligence.

The defendants were the occupants of a pier. They had placed their tracks upon it ; on either side of the tracks was a platform about three and one half feet high. The whole was used for the loading of freight upon defendants' cars. The plaintiff had been working at the river end of the pier. After dark he finished his work and proceeded on his way out upon one of the platforms. It was dark, and meeting a pile of iron, he turned toward the edge of the platform, thinking he would find it, by touching cars that he supposed to be there. There were no cars, and he walked off the platform, and was injured by falling to the ground.

The court at General Term, said: "It seems clear that there was no proof of negligence on the part of the defendants in the way they constructed or maintained the platform. If the defendants had the legal right, as it is assumed they had, to use the dock as a place where their cars might be unloaded and loaded, it is to be said that there was no proof that the platform, as it was, was not a necessary means of doing their business. So far as the exigencies of the business may be looked at, on this point,

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the inference from them would be, that the platform, without a fence running along its edge, was a fit and required structure. The only other negligence that the facts would, in any contingency, countenance, would be that the defendants had not furnished light sufficient to enable a person to see where the edge of the platform was. Evidently, it would be too great an exaction to require that after dark, when the general use of the platform had ceased for the day, the whole length of the platform for two hundred feet should be lighted. It would be more just to require that, assuming the plaintiff was upon the dock by the implied invitation of defendants, they should make light sufficient to show the edge of the platform at such points as would be near the road, that the plaintiff might be justified in taking after ending his work. It may be assumed that the defendant was bound to furnish to the plaintiff a way by which to leave the dock, either by pointing out the way specifically or by circumstances that might indicate it. There was no evidence at all, that the plaintiff was justified in thinking that the way he took was one intended for egress, or appeared to be the only way out, or the safer of two, if there were more than one. He had, in the course of the day, perceived that the platform was incumbered with iron. Soon after he started from his work, he perceived that before him it was so dark that there were apparently no indications of there being a way out. In connection with this, there was no proof that there was not another apparent way out. There was no proof that he was obliged to take the way he did. I therefore, am of opinion that there was no proof that the defendants were negligent in not furnishing light at the point where the plaintiff fell.

“I think further, that the special circumstance of this particular event, show that no negligence was proved. The plaintiff did not proceed, as if he were ignorant of the danger from the unguarded edge of the platform. He knew it and guarded against it, but insufficiently. If he had not relied on there being cars along the platform, the absence of light would not have caused his falling from the platform.

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As a fact, the accident was caused by there being no cars there. The question is, was there negligence as to what did cause the accident, and not as to what might have caused it if the circumstances had been different. I cannot think of any reason for holding that the defendants were bound to have the cars standing there.

“On the other hand the proof was that the plaintiff was negligent. He gave no proof of facts that justified him in supposing or believing that there would be cars along the line of the platform. He gave no evidence that he had seen them, in the course of the day, at this point or its neighborhood. Others may have seen them, but he did not act upon information from them. There was no proof that any one had seen cars in the neighborhood of the point in question shortly before the plaintiff left work. If they were there in an earlier part of the day, there was no reason to suppose that they would remain there. Cars are meant to move and not to stand indefinitely. It was, therefore, negligence for the plaintiff, to go into danger, relying for protection from it on the supposition of there being a guard, when he had no reason to suppose that one would be there. It is to be observed further, that if cars had been there, there is no reason to think that his hand or foot would touch a car, rather than go into the space between two cars.

“The plaintiff was one of a gang of men, hired by the consignee of hides, that arrived in a steamer. The hides had been unloaded from the steamer at the dock and delivered to the consignee, but had not been removed by him. He hired the gang to assort the hides as to quality and to fold them. It did not appear conclusively in the evidence that this was a usual thing to do in the proceeding by a consignee to remove hides. If this had appeared, the defendants would have been held to the duty they owe to one coming upon their pier by their invitation or implied request. Such also would have been their duty, if it were proven that the consignee were allowed to assort their hides, as a convenience to them granted by the defendants, on account of its practical connection with the steamer using

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the dock, in a way that was a benefit to the defendants. On the other hand, if the sorting of the hides were gratuitously permitted to the consignee, for the benefit solely of the consignee, then, in my opinion, the obligation to furnish a safe exit was due to the plaintiff from the consignee, but not from the defendants. In weighing the evidence on these points, the fact of the hides being assorted in part after the working day was over, should be considered. The direction of the judge to the jury on this point was correct. The jury was to find, on the facts, whether what the consignee and the plaintiff under him were doing, was not incident to the business of taking away the hides.

“For the reasons that have been given, my judgment is that there should be a new trial with costs to defendants to abide the event, the present verdict to be set aside, defendant’s exceptions being sustained.”

Charles W. Brooke, for plaintiff.

Frank Loomis, for respondent.

Opinion by SEDGWICK, Ch. J.; TRUAX and INGRAHAM, JJ., concurred.

Verdict set aside and new trial ordered, with costs to defendants to abide the event.

BENJAMIN LAWRENCE, ET AL., RESPONDENTS, v.
CHARLES FOXWELL, APPELLANT.

Undertaking on arrest—cannot be cancelled on motion on ground that complaint has been dismissed—Code Civ. Proc. § 600.

Before SEDGWICK, Ch. J., and TRUAX, J.

Decided June 2, 1883.

Appeal by defendant from order denying defendant’s motion to cancel and discharge an undertaking given by defendant on an order of arrest against him, and to release and discharge the sureties in the undertaking from any

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liability thereunder. The ground of the motion was that there had been entered a judgment dismissing the complaint against the defendant, upon the direction of the judge at trial term.

The court at General Term, said: "Judge INGRAHAM, who decided the motion below, was correct in holding, that section 600 of the Code does not provide for a proceeding like the one at bar, and such relief as is asked can only be granted under the provisions of that section."

W. T. B. Millikin, for appellants.

Ellis S. Yates, for respondents.

Opinion PER CURIAM.

Order affirmed with \$10 costs.

CHARLES W. BRANDT, RESPONDENT, v. THE MAYOR,
&C., OF NEW YORK, APPELLANTS.

Evidence—admission as to length of time of employment, what constitutes.—
"City Record"—Statements in as evidence against City.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided June 2. 1883.

Appeal from a judgment entered on verdict for plaintiff directed by the court.

The general term held on the former appeal (48 *Super. Ct.* 293) that it did not "appear for what length of time the plaintiff was originally employed or appointed." The only change in the evidence, on this point, was the introduction by the plaintiff of the following extract from the "City Record" of January 31, 1880: "Officers and subordinates in the departments of the city and county government, with their salaries and residences, together with the judges, clerks, and attendants of the several courts held therein . . . Police Department: Street Cleaning Bureau. Name,

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Charles W. Brandt. Position, foreman of precinct. Residence 419 78th street. Salary \$900 per annum." This evidence was objected to as irrelevant, immaterial and incompetent, and was received under exception.

The court at General Term, said: "This evidence did not prove, or tend to prove, that the plaintiff had been hired for any fixed length of time. It was simply an admission by the defendants that as long as he was continued under the existing agreement, he should be paid for his services at the rate of \$900 per annum."

D. J. Dean, for appellants.

Charles P. Miller, for respondent.

Opinion by TRUAX, J.; SEDGWICK, Ch. J., and INGRAHAM, J., concurred.

Judgment reversed and new trial ordered, with costs to the appellant to abide event.

FRANCIS DRISCHLER, ET AL., RESPONDENTS, v.
MARIE VAN DEN HENDEN, INDIVIDUALLY AND
AS EXECUTRIX, AND RICHARD VAN
DEN HENDEN, APPELLANTS.

Wills.—Rights of children born after will is executed, no provision being made for them.—Conveyance by sole legatee and devisee in fraud of rights of said children, when will be set aside.—Mutual wills—what necessary to constitute.—Guardian ad litem—failure to notify natural guardian of application for, cannot be taken advantage of upon the trial.—Gift.—Husband and wife.—Examination before trial—exclusion of testimony taken in, when not error at the trial.

Before SEDGWICK, Ch. J., O'GORMAN and INGRAHAM, JJ.

Decided June 2, 1883.

Appeal by defendant from an interlocutory judgment entered at special term.

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The court found that plaintiffs are infants under the age of fourteen years and are the children of Franz Drischler deceased and the defendant Marie Van den Henden; that plaintiffs were born after the making of the will hereafter referred to and were his only heirs at law and next of kin; that said Franz Drischler made a will by which he gave all his property to his said wife and appointed her his sole executrix, making no provisions for plaintiffs in said will; that said will was duly admitted to probate and letters testamentary issued to said executrix, who took into her possession all the assets and property of the deceased; that defendant Marie Drischler Van den Henden purchased certain real estate, paying for said property with the bonds or other property of said Franz Drischler deceased, and that said defendant had no property other than her interest in the estate of said Franz Drischler deceased; that said real estate was subsequently conveyed to the defendants Marie Van den Henden and Richard Van den Henden; that the contents of a certain drug-store and good will thereof, part of the estate of the deceased, were sold and delivered by said executrix to said Richard Van den Henden, before the marriage of said executrix to said Van den Henden for an alleged consideration of seven hundred dollars, which was an inadequate and insufficient consideration therefor; that the transfers of said real estate and drug store, to said defendant Richard Van den Henden were made with the intent to defraud the infants, plaintiffs, and to deprive them of their rights in their father's estate, and that said Richard Van den Henden was cognizant of the fraudulent character of the transfer of said property and a party thereto.

And as conclusions of law: that plaintiffs are entitled to recover the same portions of the estate of their father, Franz Drischler, deceased, as they or either of them would have been entitled to if their said father had died intestate; that the said real estate and drug store were conveyed to defendants with the intent to defraud the plaintiffs; that a trustee should be appointed to convey the said property to

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the plaintiffs subject to the rights of the defendants ; that the defendants account for all the property, and the rents, incomes, interests and profits of said real estate that came into their hands, and the full value of the drug-store before a referee.

Judgment was entered in conformity therewith, from which defendants appeal.

The court at General Term said: "I have carefully examined the testimony given on the trial and am of the opinion that the findings of facts are sustained by the evidence.

"The defendants claimed that the complaint should have been dismissed, because it appears that the guardian *ad litem* for the infants, plaintiffs, was appointed without notice to the defendant, who was the mother of the plaintiffs, and with whom they were residing at the time of his appointment. I do not think that such an objection could be taken at the trial where the court has jurisdiction of the cause of action and the persons of the parties. A failure to appoint a guardian *ad litem* for an infant plaintiff, is simply an irregularity, and such an omission does not deprive the court of jurisdiction (*Rutter v. Puckhover*, 9 *Bosw.* 638). In this case the court appointed a guardian, and having jurisdiction to make such an appointment, it cannot be questioned collaterally, but only by a motion to set aside such an appointment as irregular. It appears that such a motion was made and denied and from the order denying it no appeal was taken. This I think concluded the parties here as to any alleged irregularity.

"The appellant also moved to dismiss the complaint on the ground that it did not appear in evidence that no other settlement had been made for the children of the testator. The will of deceased gave to the defendant all his real and personal property, of whatever nature or kind of which he was possessed, at the time of his death. It was alleged in the complaint, and it appears by the evidence, that the defendant had taken possession of all the assets and property left by the deceased, and there were no allegations in

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the pleadings, and no evidence offered at the trial, that the plaintiffs were provided for by any settlement. This I think is sufficient to bring the case within the statute. The will was made several years before the plaintiffs were born; it gave all the property of the deceased to his wife; on the death of the testator the wife took possession of all the property and assets of the deceased; and the infants were at the time of the testator's death under the age of fourteen years. These facts are entirely inconsistent with the idea that the testator had provided by any settlement for the plaintiffs, and were I think sufficient to put the defendants to the proof of such a provision by settlement if one had been made.

“The real estate of the testator therefore, descended to the plaintiffs, and they were entitled to the same share of the personal property as if the testator had died intestate (Smith v. Robertson, 89 N. Y. 555).

“The fact that at the time of the execution of the will in question, the defendant made a will leaving all her property to the testator, does not of itself make the wills mutual wills. In order to make a mutual will the instrument, or instruments, must be executed by both parties under an agreement to make such a disposition of the property of each, that the survivor will be entitled to the property of the one first dying, or the disposition of the property must be in the instrument executed by both of the parties. There is no evidence in this case that the defendant made her will under any such agreement or understanding, or in fact that the testator ever knew that she had made a will in his favor, except the fact that he signed the defendant's will as a witness.

“The evidence was not sufficient to establish a gift of the \$18,800 of United States bonds by the testator to the defendants; the most that can be said is that there was some evidence from which such a gift might have been found. The burden of proving a gift is on the party alleging it, and the mere manual possession of a deceased husband's property by his widow is not *prima facie* evi-

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dence of a change of title to her (*Conklin v. Conklin*, 20 *Hun*, 278).

“The exclusion of the examinations of the defendant taken before trial, was not error. The defendant had been examined on her own behalf, the plaintiff had then rested their case on rebuttal, and it was within the discretion of the trial court whether to allow the defendant to be recalled or not, and under the circumstances, I do not think that there was such an abuse of that discretion as would justify a reversal. Under any circumstance no harm could come to the defendant, as after the rejection of the evidence, the court allowed her to be recalled and testify.”

William C. Clifford, for appellant.

John P. Pannes, for respondent. .

Opinion by INGRAHAM, J.; SEDGWICK, Ch. J., and O'GORMAN, J., concurred in result.

Judgment affirmed with costs.

ADOLPHE M. WEISS, v. HARVEY FARRINGTON.

Contract—construction of.—Agreement to pay \$200 per month, \$100 to be spent in traveling expenses, detailed account of which is to be given, to be deemed absolute contract to pay \$200 per month.

Before SEDGWICK, Ch. J., and INGRAHAM, J.

Decided June 2, 1883.

Exceptions ordered to be heard in the first instance at the general term, upon verdict directed for plaintiff.

The only question in this case was the construction of the agreement in which the action was brought. That agreement provided that defendant should pay to plaintiff one half of the profits accruing from sales of merchandise by plaintiff, for account of defendant, during the year 1881; and that the defendant should advance on account of said profits \$200, at the end of each month—\$100 to be applied in payment of his traveling expenses. It was also agreed that

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should half the profits not equal the amount above stated, there should be no charge by defendant against plaintiff. Defendant claimed that under that contract, plaintiff was entitled to \$100 per month, and traveling and other expenses. The judge at the trial held that the plaintiff was entitled to the \$200 per month, and directed a verdict accordingly.

The court at General Term said: "I am of the opinion that the construction of the contract by the trial court was right. The defendant agreed to advance, not \$100 per month and expenses, but \$200 per month. That obligation was absolute; it did not depend on the amount of the profits or on any other contingency; and at the end of each month plaintiff was entitled to receive the advance of \$200. The complaint alleges that said sum was not paid, and that the answer admits. There is nothing inconsistent with this obligation in the fact that plaintiff was to render a detailed account of his expenses. The obligation still remained, and on his performing his part of the agreement, he was entitled to enforce such obligation."

Stern & Myer, for plaintiff.

Edward Kempter, for defendant.

Opinion by INGRAHAM, J.; SEDGWICK, Ch. J., concurred.

Exceptions overruled and judgment ordered for plaintiff on the verdict with costs.

BENJAMIN H. TAYLOR, ET AL., v. THE SECOND AVENUE R. R. CO.

Agency—cannot be established by declarations of assumed agent.—Ratification—admission by president of corporation, when not sufficient to constitute.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided June 2, 1883.

Appeal by both parties from judgment entered in favor of the plaintiff on a verdict of a jury.

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Action to recover from the defendant for certain work and materials furnished by plaintiff and used in the erection of a depot built for defendant, and for which plaintiff alleges, defendant promised to pay.

Plaintiff was allowed, under objection, to testify, that Mr. Prague the architect of the defendant went to plaintiff's place of business about November 3, 1877, and represented himself as the architect of defendants and an agreement was made with Mr. Prague to do some extra work, and that he, Mr. Prague, told witness that the president of the defendants had authorized him to make an agreement to pay for the work; that the president of the defendant had authorized Prague to say to witness, that if he would go on and put the roof on at the contract price, less five per cent., the company would assume it."

The court at General Term, said: "This evidence was clearly inadmissible as against the defendant. Mr. Prague was merely the architect of the defendant. There is no evidence in the case, that he was employed by the company at all, except to make the plans for the buildings and see that the plans were carried out, or had any authority to bind them in any way; and no declarations of his are admissible as against the defendant. An agency cannot be created by the representations of an assumed agent (*Marvin v. Wilbur*, 52 *N. Y.* 270) and the admission of such representative without subsequently showing that the party making them, was agent of the company, or connecting the company in any way with the conversation, is error (*Snook v. Lord*, 56 *N. Y.* 605). The alleged admission of Mr. Mehrbach at a subsequent interview that he had sent Mr. Prague to the plaintiffs to have them go on and do the roofing, does not make the evidence competent. No authority to the president to either make the contract or to bind the defendant by admissions, was proved, and the defendant could not be bound by his declarations made after the transaction in question (*First National Bank v. Ocean National Bank*, 60 *N. Y.* 278).

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James A. Hudson, for plaintiff.

Austin G. Fox, for defendant.

Opinion by INGRAHAM, J. ; SEDGWICK, Ch. J., and TRUAX, J., concurred.

Judgment reversed and new trial ordered, costs to abide event.

WILLIAM ULLNER v. FREDERICK BUTTERFIELD.

Statute of limitations—distinctions in its operation on residents and on non-residents—absences from the state, etc.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided June 2, 1883.

Plaintiff's exception to a verdict directed for defendant and ordered to be heard in the first instance at general term.

The action was for injury to plaintiff's personal property from defendant's alleged negligence. The defense, among others, was the statute of limitations.

The court below delivered the following opinion upon dismissing the complaint: "In its practical application, the statute of limitations applies to both residents and non-residents, but its construction becomes very different when certain things are considered, viz.: Whether the defendant, at the time when the cause of action accrued, was a resident or a non-resident? A non-resident is never presumed to be here; hence, he is always presumed to be absent until shown to be here; and, therefore, the statute does not commence to run as to him until he comes within the state; and, under the operation of the statute, the plaintiff has six years from that time within which to commence his action. In the case of a non-resident making successive visits and successive departures, the aggregate time that he spends here must be considered (counted). But in the case of a resident, the rule works the other way; he is

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always presumed to be here (within the state), unless shown to be absent; hence, as to him, the plaintiff must commence his action within six years, unless the defendant be absent from the state in a certain way; if so absent, that time is not counted as a part of the six years, and operates as an extension of the six years of limitation.

Now, in this case it appears, that although there were a number of absences on business, none of them amounted to a year, and none of them were, under such circumstances, that it can be held, as matter of law, that the defendant acquired a residence abroad. The provisions of the Code extending the statute in actions of this nature, apply only when it is shown that during the running of the statute the defendant acquired a fixed residence outside of the state, or in case he does not acquire such fixed residence, if the absence is continuous for at least a year. So that under the decisions as they now stand, the true interpretation of the Code is that this action should have been commenced within six years, it having been proved that the defendant was here when the cause of action accrued and was also here at the time when the plaintiff claims his action was commenced by placing the summons in the hands of the sheriff for service, although the proof shows that the actual service in this case was made beyond the time when the plaintiff should have brought his action. The Code provides that an action may be deemed to be commenced so as to save the statute, provided the summons is delivered to the sheriff with the intent that it shall be actually served. That was done within the six years in this case; but the Code further provides that the plaintiff shall take nothing by doing this, unless it is followed up by the actual personal service thereof upon the defendant within sixty days after the expiration of the time limited by the statute, or by the first publication of the summons as against the said defendant within that time, pursuant to an order for service upon him in that manner. Now, in this case, although the summons was delivered to the sheriff within the six years, yet as it was not followed up by either the personal service

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thereof or by the first publication thereof within the time limited by law, the plaintiff did not commence his action within the meaning of the Code, within the time limited by law ; hence the defendant is entitled to a verdict.”

The court at General Term said : “ Judge FREEDMAN, in his opinion below, made it clear that the action was barred by the Statute of Limitations. The question was whether under § 401, Cod. Civ. Proc., any absence of the defendant as shown by the testimony required that the time of the absence should be added to the time otherwise limited by the statute. There were several absences. None of them was for more than six months. Added together they would have extended the statutory term so, that the action would not be barred. The plaintiff was entitled to no time, by the operation of the first sentence of the section, viz. ; ‘ If when the cause of action accrues against a person, he is without the state, the action may be commenced within the time limited therefor, after his return into the state.’ The proof was that when the action accrued the defendant was within the state, was also a resident of it. The next sentence is, if after a cause of action accruing against a person, he departs from and resides without the state or remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of the limited time. The proof was from circumstances, that defendant was a resident of this state when the cause of action accrued, and it was direct that his absences were not for residence out of the state, and that he was not absent, at any time, continuously for the space of a year or more. The facts were so full, that they raised no question, that calls for discussion.”

Smith, Allen & Smith, for plaintiff.

Boardman & Boardman, for defendant.

Opinion PER CURIAM.

Exceptions overruled and judgment for defendant entered on the verdict with costs.

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JOSEPH J. KELLY, RESPONDENT, v. EDWARD C. SHEEHY, APPELLANT.

Forcible entry and detainer—treble damages—value of period for which premises are detained, possibility if premises had not been detained, of longer letting than such period may be considered.

Before SEDGWICK Ch. J., TRUAX and INGRAHAM, JJ.

Decided June 2, 1883.

Appeal by defendant from judgment entered upon verdict and from order trebling damages.

Action for damages, for forcible entry (Code Civ. Pro. § 1069). The jury found single damages, which were reduced as excessive by order of the judge, and by the same order the reduced amount was trebled.

It appeared that the defendant was guilty of the forcible entry, and that he detained the premises from the plaintiff for the space of about five months. The complaint claimed as damages in part, the value of the use and occupation for the five months.

The court at General Term said: "It is a mistake to suppose that the claim was for the use and occupation by the defendant as upon a letting. It was upon the value to the plaintiff of the use and occupation if he had not been prevented from disposing of it by the defendant. There was nothing incorrect in the court charging that the jury in estimating the value referred to might consider what it would be for the five months, if the plaintiff could rent it for one year, including the five months. The power of the plaintiff to use, the occupation for five months in such a way, affected the actual value, to the plaintiff.

"The appellant's counsel argue, that the court had no power to treble the damages, because the complaint contained a claim for damages that could not be recovered in an action for forcible entry. It is true that the complaint did make such a claim, but there was no recovery upon it, and the present case, being a part of the record, this appears upon the record."

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Henderson & Tompkins, for appellant.

John Townshend, for respondent.

Opinion PER CURIAM.

Judgment affirmed with costs, and order affirmed with \$10 costs.

LATIMER BAILEY, APPELLANT, v. JAMES RICHMOND, RESPONDENT.

Pleading.—*Statements as to indebtedness and as to "succession" to partnership claim—when deemed conclusions and not facts.*

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, J.

Decided June 2, 1883.

Appeal by plaintiff from judgment in favor of defendant, upon demurrer by defendant to the complaint.

The complaint rested upon the averments that between certain dates, the defendant became indebted in a certain sum, in that between the said dates, the defendant was employed as a clerk by a firm of Albinola & Bailey, at a stated salary, and that between such dates, the defendant drew from the firm the sum of \$721.36 more than was due him from said firm, for his salary as clerk aforesaid, or by reason of any other cause or thing whatsoever.

The court at General Term, said: "It is evident, that conclusions only are here pleaded, and not facts upon which legal judgment is asked, and for this reason the complaint was demurrable as to the first cause of action."

As to both causes of action, the complaint also averred that "the plaintiff succeeded to the business, book accounts and property of said firm of Albinola & Bailey, and to the claim against the defendant; that said succession and title was obtained by a written instrument on the part of the plaintiff's then copartner, and which instrument plaintiff will refer to on the trial thereof."

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The court at General Term, said : " It is also evident that here, the plaintiff has given his judgment as to there having been a succession, rather than the facts which would make him the assignee or transferee of the firm. "

Alexander H. Nones, for appellant.

G. A. Seixas, for respondent.

Opinion PER CURIAM. ~

Judgment affirmed with costs.

GEORGE RANDALL, RESPONDENT, v. JAMES HAVE-
MEYER, APPELLANT.

Corporations.—Pleading—action to enforce stockholder's statutory liability in case of non-payment capital stock—allegation that capital stock had been reduced, when material to stockholder—appointment of receiver of corporation, allegation as to, not material.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided June 2, 1883.

Appeal by defendant from order striking out part of answer, as irrelevant, and requiring another part to be made more definite and certain.

The court at General Term, said : " So far as the order directed the answer to be made more definite and certain, it did not affect any substantial right of the defendant, and it should be affirmed. "

The action was brought by the plaintiff as a creditor of a mining company, after judgment obtained and execution returned, to recover from the defendant, as a stockholder of the company, the amount due to plaintiff on the ground that the capital of the company had not wholly been paid in. The complaint alleged that the defendant was the owner of stock to an amount specified.

The answer alleged that before the judgment referred to was obtained, the capital stock of the company was dimin-

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ished to one-tenth of the original amount. The order below struck out as irrelevant, the words that constituted this allegation.

The court at General Term, said : " This was erroneous. The answer had controverted the averment of the complaint, as to the amount of stock owned by the defendant, and had alleged that the amount was one hundred shares, and no more. The defendant had a right to take the position that the number of shares which might be the basis of his responsibility was to be determined in part, by the reduction of the original amount of the capital. This position was not irrelevant to the issue referred to, and even if not well taken as a defense, or part of a defense, should not have been stricken out, so that the defendant could not use it in the trial of the issues. 'The order should be reversed so far as it struck out the matter that has been examined.'"

The order also struck out as irrelevant, allegations that a permanent receiver of the property of the company had been appointed, who had entered upon his trust and had taken possession of all the property of the company, and had never been discharged.

The court at General Term, said : " This is not pleaded as a separate defense and is not relevant to any defense pleaded, or to any that can be suggested as possible. It would not be received as evidence upon any issue that might be made upon the trial. The order was correct in this respect."

T. H. Barowsky and Lemuel Skidmore, for appellant.

Samuel L. Harris, for respondent.

Opinion PER CURIAM.

Order reversed in part and affirmed in part, as above indicated, without costs to either party.

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J. STUART McALEER, RESPONDENT, v. WARREN H. CORNING, ET AL., APPELLANTS.

*New trial—motion for stating no grounds, raises no question on appeal.—
Amendment at trial—as to time of employment.*

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided June 2, 1883.

Appeal from a judgment and from an order denying a motion for a new trial.

Action for breach of contract of employment.

The court at General Term, said: "The motion for a new trial on the minutes was general and did not call the attention of the court to any point as a basis of the motion, and, therefore, it raises no question upon appeal. The grounds of the motion should have been stated (*Gray v. N. Y. Floating El. Co.*, 13 *W. D.* 140; *De Luce v. Kelly*, 5 *Id.* 32)."

The complaint alleged an employment made on or about April 30. It was amended to read April 8, to conform to the facts proved.

The court at General Term, said: "The amendment made by the court on the trial does not furnish grounds for reversing the judgment. The variance was not material (*Hovey v. Am. Mut. Ins. Co.*, 2 *Duer*, 554)."

W. M. Safford, for appellants.

J. H. Mapes, for respondent.

Opinion PER CURIAM.

Judgment and order affirmed with costs to respondent, without prejudice to motion for new trial at special term, on the facts.

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LOUIS G. HART, APPELLANT, v. THE TRUSTEES CONGREGATION SHEARITH ISRAEL, RESPONDENTS.

Religious corporation—powers of individual trustees and of president—person dealing with president chargeable with notice of limitations of power.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided June 2, 1883.

Appeal from judgment entered on the dismissal of the complaint. The action was tried before a court and a jury.

Action by broker to recover his commissions upon a sale of real estate, belonging to the defendant.

“The court at General Term, said: “There is no evidence that the plaintiff was ever employed by the defendants to sell the real estate in question. Mr. Nathan had no power to bind the defendants. He never attempted to bind them. That could only be done by the trustees of the corporation as a board and not as separate individuals (*Constant v. The Rector, &c.*, 4 *Daly*, 305). There was nothing in defendant’s constitution and by-laws that gave any authority to the president, or acting president of the trustees, any power to employ the plaintiff, without the knowledge or consent of the board of trustees, and the plaintiff was chargeable with notice of the president’s authority, and of the limitations and instructions upon it, contained in said constitution and by-laws (*Dabney v. Stevens*, 32 *Super. Ct.* 415).

Everett P. Wheeler, for appellant.

Charles A. Lane and *Morris Goodhart*, for respondent

Opinion PER CURIAM.

Judgment affirmed with costs.

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THE HEALTH DEPARTMENT OF THE CITY OF
NEW YORK, &C., RESPONDENT, v. THOMAS
O'REILLY, APPELLANT.

Injunction pendente lite—when appeal from order granting will not be heard, on ground that action has been tried on merits, and temporary injunction is merged in judgment entered.

Before SEDGWICK, Ch. J., TRUAX and INGRAHAM, JJ.

Decided November 5, 1883.

Appeal by the defendant from an order made at special term, December 29, 1882, continuing the injunction heretofore granted *pendente lite*, December 4, 1882, restraining the defendant, his agents and servants, from continuing the work upon the building or tenement-house, known as No. 1089 First avenue, in the City of New York, and from completing or finishing the same contrary to the requirements of law, and from selling, letting, hiring, occupying, or using in any manner the said house or any part thereof.

The action was brought to enforce Laws of 1867, 1879 and 1880, known as the tenement-house laws.

After the order appealed from had been entered and before the appeal therefrom had been heard the action was tried on its merits and a judgment was entered restraining the defendant from doing the acts, the doing of which had been restrained by the order appealed from.

The court at General Term, said: "The order appealed from is merged in the judgment. An examination of the records of the court shows that the judgment covers the whole case, and that it superseded the injunction order. In such a case, the court will not hear the appeal from an order that has been merged in a judgment but will leave the appellant to his appeal from the judgment."

Joseph Koch, for appellant.

W. P. Prentice, for respondent.

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Opinion by TRUAX, J. ; SEDGWICK, Ch. J., and INGRAHAM, J., concurred.

Appeal dismissed, with costs and disbursements.

JOHN W. JARBOE, ET AL., APPELLANTS, v. JAMES MULRY, RESPONDENT.

Lease for five years—letter signed by party to be charged, containing other requisites, and alluding to premises only, “as I described them,” is insufficient.

Before SEDGWICK, Ch. J., FREEDMAN and O’GORMAN, JJ.

Decided December 3, 1883.

Appeal by plaintiffs, from judgment for defendant entered upon a direction at trial term dismissing the complaint.

Action was for alleged breach of an alleged contract to give a lease for five years of certain real estate. The only writing signed by the defendant was a letter directed to the plaintiff, as follows: “I to-day sold the lot to the Quintard Works and signed the contract for the same and received part of the money, hence that part is settled. I now propose to let the premises to you, as I described them, for five years at \$1,800 per year, and with a privilege of five more, at \$2,000, and will get it ready for occupancy on the 1st of April.”

The court at General Term, said: “The only evidence that the proposition of this letter was ever accepted, which was necessary to the existence of the contract, was another letter written by the plaintiff, but this letter contained terms and further propositions which were not in the writing signed by defendant. There was therefore, no contract proven. The letter moreover could not be considered to be a contract inasmuch as it did not state what premises were to be leased. The letter alluded to them as premises ‘as I described them.’ The reference was to a conversation.

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This could not be used as a part of a contract which by statute must be wholly in writing (*Wright v. Weeks*, 25 *N. Y.* 153).

E. T. Wood, for appellants.

Malcolm Campbell, for respondent.

Opinion by SEDGWICK, Ch. J. ; FREEDMAN and O'GORMAN, JJ., concurred.

Judgment affirmed with costs.

MARY LONDRIGGAN, AS ADMINISTRATRIX, &c., APPELLANT, v. THE N. Y., N. H. & H. R. R. Co., RESPONDENT.

Appeal from order overruling demurrer to answer—will not lie before judgment.

—Statute of Limitations—right of foreign corporation to take advantage of in action against it for causing death.—Code Civ. Proc.

§§ 401, 414, 1902.

Before FREEDMAN and O'GORMAN, JJ.

Decided December 3, 1883.

Appeal from order overruling the demurrer interposed by the plaintiff to the second defense set up in the answer of the defendant and directing judgment for the defendant thereon.

Action upon the following section of the Code of Civil Procedure: "§ 1902. The executor or administrator of a decedent . . . may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against . . . a corporation which would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death." The wording of the original act on this subject was: ". . . provided that every such action shall be commenced within two years after the death of

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such deceased person" (*Laws* 1847, ch. 450). Plaintiff's intestate was killed October 23, 1878. This action was commenced October 1, 1881. The defendant set up two defenses, one of which was as follows: "Second.—That for a further defense, the defendant says: That this action was not commenced within two years after the death of the said Patrick Londrigan." The plaintiff demurred to the above defense, upon the ground that it was insufficient in law. The court, at Special Term, ordered that the demurrer be overruled with judgment for the defendant, from which order this appeal is taken. The following opinion was rendered:

SEDGWICK, Ch. J.—"If it were not for § 401, *Code Civ. Pro.*, the limitation of the time of enforcing civil remedies would be applied to all defendants irrespective of their being in or out of the state, residents or non-residents, at the time of the accruing of the action or during the limited time. Upon provisions similar to § 401 it was held that foreign corporations could not avail themselves of the Statute of Limitations, because such provisions applied to corporations as well as natural persons, and a foreign corporation was always without the state (*Olcott v. Tioga R. R.*, 20 *N. Y.* 210). Section 414 declares that the provisions of chapter 4 shall apply, except in a case where a different limitation is expressly prescribed by law. If this were all, inasmuch as the present case is under § 1902, which prescribes a special limitation of two years, it would seem to be clear that the provision of § 401 does not apply to the case, and the plaintiff is not authorized to commence the action at any time after the time specially limited therefor has passed. The only doubt, however, that occurs to me would be, if at all created by the question whether the words the 'provisions of this chapter' were not so limited by its connection as not to refer to all the provisions in the widest sense, but refer to the times especially declared within which actions may be begun—*e. g.*, twenty years for ejectment, six years for contracts not under seal, &c. The words are: 'The provisions of this chapter apply and

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constitute the only rules of limitation applicable to a civil action,' &c. A scrutiny of § 401 shows that the enlargement of the time given by it, upon the conditions it names, is in an exact sense a limitation of time, and is a rule of limitation, as also are the specific terms before-named in the chapter. The demurrer should be overruled with judgment for defendant."

Cooper & Whitlock, for appellant.—Under section 401 of the Code, the defendant stands in all respects as a domestic corporation in regard to all limitation statutes, provided that they comply with subdivision 2 of section 432 of the Code. It does not appear by the answer that this certificate has been filed. A foreign corporation cannot under any circumstances avail itself of a statute of limitation in the courts of this state (*Rathbun v. Northern Central R. R.*, 50 *N. Y.* 656; *Boardman v. Lake Shore & Michigan Southern R. R. Co.*, 84 *Ib.* 185).

W. E. Barnett, for respondent.—No action for causing death could be maintained under the common law. To sustain the action every condition of the statute must be complied with, one of which is that "such an action must be commenced within two years after the decedent's death" (*Brown v. Harmon*, 21 *Barb.* 508; *Yertore v. Wiswall*, 16 *How.* 8).

Prior to the death of the plaintiff's intestate, chapter IV. of the Code of Civil Procedure, containing the general statutes of limitation and the rules and exceptions in relation thereto, had been enacted; but the whole chapter is made subject to the qualifications contained in § 414, which provides that "the provisions of this chapter (chapter IV.) apply, and constitute the only rules of limitation applicable, to a civil action . . . except in one of the following cases: (1) A case where a different limitation is specially prescribed by law." An action under § 1902 is "a case where a different limitation is specially prescribed," and is therefore expressly excepted from the "rules of limitation" contained in chapter IV., including the "rule" in

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§ 401, under a provision similar to which the cases above cited were decided.

It follows that *Olcott v. Tioga R. R. Co.* (20 *N. Y.* 210), and *Rathbun v. N. C. R. R.* (50 *N. Y.* 656), are not now authority for sustaining the plaintiff's demurrer in the case at bar (*Throop's Code*, § 414, note).

Boardman v. L. S. & M. S. Ry. (84 *N. Y.* 157), though recently decided, was commenced in 1875, two years before chapter IV. of the Code of Civil Procedure took effect. It was not a case governed by any special limitation, and of course the points raised in the case at bar were not considered in that action. Moreover, it was unnecessary in that case to make any decision as to the disability of a foreign corporation to plead the statute of limitations.

The "designation" provided in the last clause of § 401 of the Code of Civil Procedure would enable a foreign corporation to plead the statute of limitations in actions mentioned in titles 1 and 2 of chapter IV. and not commenced within the times limited in those titles. It is not necessary for such a corporation to show the filing of a "designation" in order to be enabled to plead the statute of limitations in an action under § 1902, if the final sentence in that section is to be treated as a statute of limitations.

The court at General Term said: "If this appeal could be entertained, I would have no hesitation in holding, as the merits have been argued and examined, that the learned chief judge was right in the conclusion reached and the assignment of his reasons therefor. But it has been repeatedly held that an appeal from such an order will not lie before judgment" (*Cambridge Valley Nat. Bank v. Lynch*, 76 *N. Y.* 514; *Garner v. Harmony Mills*, 45 *Super. Ct.* 148; *Campbell v. N. Y. Cotton Exchange*, 47 *Super. Ct.* 558).

Opinion by FREEDMAN, J.; O'GORMAN, J., concurred.

Appeal dismissed, with costs.

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DOMINICK MALONE, APPELLANT, v. ROGER M. SHERMAN, RESPONDENT.

Pleading—rules of construction.—Action by client against attorney for alleged breach of duty resulting in clients imprisonment on criminal charge.

Before SEDGWICK, Ch. J., FREEDMAN and O'GORMAN, JJ.

Decided December 17, 1883.

The complaint was dismissed upon the opening of the trial by the trial judge, and the exceptions ordered to be heard in the first instance at general term.

Action for \$50,000 damages, alleged to have been sustained by the plaintiff, by reason of the alleged neglect of the defendant as his attorney, in this, that the plaintiff having been convicted of a criminal offense, in the United States circuit court, for the southern district of New York, and the defendant having, at the request of the plaintiff, filed in said court a notice of motion for a new trial on exceptions, and in arrest of judgment, the defendant, without the authority of the plaintiff, and without notice to him, did maliciously, fraudulently, and with intent to injure the plaintiff, withdraw and countermand said notice, and did thereby deprive the plaintiff of his right to appeal. The complaint further set forth, that plaintiff, not knowing of said withdrawal of notice of motion, did employ counsel to make said motion; that an affidavit of defendant that he had countermanded said motion, substantially on the ground that plaintiff had failed to pay him counsel fee for making said motion, was used on said argument by the attorney for the United States, that the court denied said motion; and that plaintiff was actually sentenced and imprisoned, and compelled to pay a fine of \$1,000.

The court at General Term, said: "It will be presumed that the plaintiff has stated all the facts most favorable to himself, giving, however, to his complaint a liberal construction with a view to substantial justice between the parties (Code, § 519). The law, however, will not assume

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in favor of the plaintiff, the existence of any fact that he has not averred (*Cruger v. Hudson R. R. Co.*, 12 *N. Y.* 190), or accept as facts, any mere conclusion of the plaintiff himself as to malice, or fraud, or evil intent on the part of the defendant. The conviction of the plaintiff in the United States circuit court, must, in the absence of any allegation to the contrary, be presumed to have been lawful. The motions on behalf of the plaintiff for a new trial, etc., were, notwithstanding the action of the defendant complained of, argued by counsel on behalf of the plaintiff, and denied by the court; and for all that appears, fully heard on the merits and denied by the court without any regard to the affidavit made by the defendant or the withdrawal of the notice of motion. The action of the court in denying the motion and in sentencing the plaintiff, must be presumed, in the absence of any allegation to the contrary, to have been lawful, as also his fine and imprisonment in pursuance of said sentence. There is no allegation in the complaint as to the grounds on which the plaintiff desired to appeal and review the verdict of the jury rendered against him, or that he had any good ground on the law or the facts of his case for said motion; nor does he allege that he could have succeeded on such motion but for the action of the defendant complained of."

Klebisch & Wehle, for appellant.

Roger M. Sherman, respondent in person.

Opinion by O'GORMAN, J.; SEDGWICK, Ch. J., and FREEDMAN, J., concurred.

Exception overruled, and judgment ordered for the defendant, with costs.

December 30, 1882—February 5, 1883.

CLINTON H. BLAKE, *et al.*, appellants, *v.* ISIDOR ROSENTHAL, *et al.*, respondents; EDMUND W. CONVERSE, *et al.*, appellants, *v.* ISIDOR ROSENTHAL, *et al.*, respondents; HENRY LEWIS, *et al.*, appellants, *v.* ISIDOR ROSENTHAL, *et al.*, respondents.

Decided December 30, 1882. Appeal by the plaintiffs in each of the above entitled actions from the judgment dismissing the complaint upon the merits. Marsh, Wilson & Wallace, for appellants. Richard S. Newcomb, for respondents. Opinion by Freedman, J.; Sedgwick, Ch. J., and Russell, J., concur. Judgments appealed from severally affirmed, with costs.

NATIONAL BANK OF VIRGINIA, appellant, *v.* ROBERT A. MILLS, *et al.*, respondents.

Decided December 30, 1882. Appeal from judgment dismissing complaint for lack of proof. W. L. Royall, G. L. Carlisle and E. P. Wilder, for appellant. Thomas Bracken, J. J. Roche, and A. J. Vanderpoel, for respondents. Freedman and Russell, JJ., sitting. Per Curiam.—Agree to affirm on the opinion below, with costs.

HORACE N. GILBERT, appellant, *v.* SAMUEL L. HARRIS, respondent.

Decided December 30, 1882. Appeals by receiver from orders denying action to punish defendant as for contempt, and denying motion to vacate order of discontinuance. George C. Lay, for appellant. Samuel L. Harris, respondent in person. Sedgwick, Ch. J., and Russell, J., sitting. Per Curiam.—Agree to affirm both orders without opinion.

THOMAS MEREDITH, appellant, *v.* THE FORTY-SECOND STREET, &C., R. R. Co., respondent.

Decided February 5, 1883. Appeal from order made on

February 5, 1883—February 19, 1883.

the judge's minutes setting aside a verdict in favor of the plaintiff on the ground that said verdict was against the weight of evidence. C. D. Rust and Erastus New, for appellant. Ely & Smith, for respondent. Opinion by O'Gorman, J.; Truax, J., concurred. Order appealed from affirmed, with \$10 costs.

JAMES MALCOLM, appellant, *v.* HENRY F. HAMMILL, respondent.

Decided February 5, 1883. Appeal from order fixing the compensation of Charles W. Dayton, the receiver, etc., of Henry F. Hammill, at the sum of \$675. Stern & Myer, for appellant; John H. Cole, for respondent. O'Gorman, J.—The judge at special term, in fixing \$675 as the compensation of the receiver, acted on his understanding of an offer made by the appellant's counsel in open court, and accepted by the counsel for the respondent. We cannot now go into an investigation of the different interpretations of which that offer may be susceptible, but must accept that interpretation which was given to it by the judge before whom it was made. Sedgwick, Ch. J., concurred. Order affirmed, with \$10 costs.

NORMA L. NICHOLS, respondent, *v.* WILLIAM D. NICHOLS, appellant.

Decided February 19, 1883. Appeal by defendant from order denying his motion to offset a judgment attained by him, for costs against an order for payment of alimony to plaintiff. Lawrence & Waehner, for appellant. Holmes & Adams, for respondent. Sedgwick, Ch. J., Truax and O'Gorman, JJ., sitting. Per Curiam.—Order affirmed with \$10 costs, and disbursements to be taxed.

PETER W. GALLAUDET, respondent, *v.* WILLIAM G. STEINMETZ, appellant.

Decided February 19, 1883. Appeal by defendant from

April 9, 1883.

judgment upon verdict for plaintiff, as directed by the court. Dana & Clarkson, for appellant. Niles & Bagley, for respondent. Opinion per Curiam.—Sedgwick, Ch. J., Truax and O'Gorman, JJ., sitting. Judgment reversed, with costs of appeal to appellant to abide event.

RUFUS HATCH, respondent, *v* THE WESTERN UNION TELEGRAPH Co., *et al.*, appellants.

Decided April 9, 1883. Appeal from order granting injunction *pendente lite*. Martin & Smith, for respondent. Dillon & Swayne, for appellants. O'Gorman, J.—The order made at special term of this court, bearing date the 26th day of December, 1882, and entered December 29th, 1882, in the office of the clerk of the superior court, appealed from, is affirmed, with \$10 costs. Sedgwick, Ch. J., concurred; Ingraham, J., dissented (See *Williams v. Western Union Telegraph Co.*, *ante*, p. 140).

HENRY L. BUTLER, *et al.*, appellants, *v*. MOSES STERN, *et al.*, respondents.

Decided April 9, 1883. Appeal from order denying a motion on the part of the plaintiff for an order overruling the defendant's answer as frivolous, and for judgment thereon. Rudolph Sampter, for appellants. Kaufman & Sanders, and Louis A. Wagner, for respondents. O'Gorman, J.—This motion was made under section 537 of the Code of Civil Procedure, which provides that if the application be denied, an appeal cannot be taken from the determination, and the denial of the application shall not prejudice any of the subsequent proceedings of either party. Sedgwick, Ch. J., concurred. Appeal dismissed, with \$10 costs, and the order of the special term affirmed.

AMELIA LANGLEY, respondent, *v*. THE SIXTH AVE. R. R. Co., appellant.

Decided April 9, 1883. Appeal by defendant from judg-

May 7, 1883.

ment entered on verdict of jury and from order denying motion for new trial made upon judges minutes. D. R. O'Sullivan and D. M. Porter, for appellant. Benjamin T. Mudgett and Freeman J. Fithian, for respondent. Opinion per Curiam.—Sedgwick, Ch. J., O'Gorman and Ingraham, JJ., sitting. Judgment affirmed, with costs, and order appealed from affirmed with \$10 costs.

FREDERICK VOSS, by Guardian, &c., respondent, *v.* THE THIRD AVENUE R. R. Co., appellants.

Decided May 7, 1883. Appeal from judgment for plaintiff for \$20,701.69, and from order denying a motion for a new trial on the minutes. Lauterbach & Spingarn and John Graham, for appellants. Stilwell & Swain and A. H. Dailey, for respondent. Opinion by O'Gorman, J.; Ingraham, J., agrees that judgment should be affirmed. Judgment affirmed, with costs, and order appealed from affirmed, with \$10 costs.

EBEN F. BACON, respondent, *v.* HORACE B. CLAFLIN, *et al.*, appellants.

Decided May 7, 1883. Appeal by defendants from judgment for \$6,664.58, entered May 16, 1882, in favor of plaintiff, and from order denying defendants motion for new trial on the minutes. Vanderpoel, Green & Cuming, for appellants. Martin & Smith, for respondent. Opinion by O'Gorman, J.; Sedgwick, Ch. J., concurred; Ingraham, J., concurred in result. Judgment affirmed with costs, and order appealed from affirmed, with \$10 costs.

GEORGE W. WOOD, appellant, *v.* RUDOLPH F. RABE, *et al.*, EXRS, &c., *et al.*, respondents.

Decided May 7, 1883. Appeal by plaintiff from judgment in favor of defendants, entered upon decision of judge at special term. Deyo, Duer & Bauerdorf, for appellant.

May 16, 1883.

Edward Browne and Rudolph F. Rabe, for respondents. Sedgwick, Ch. J., O'Gorman and Ingraham, JJ., sitting. Per Curiam.—There is no material difference between the case, in its present state, and when it was decided at the former general term (*Wood v. Mulock*, 48 *Super. Ct.* 70). That decision requires the affirmance of the present judgment. In *Robbins v. Robbins* (89 *N. Y.* 251), the court of appeals said that the trust was executed as to the real estate. In view of the finding of fact, that no agreement between plaintiff and defendant to the effect that the defendant should use the judgment obtained, by defendant, for the purpose of redeeming the property and should transfer the said property to the plaintiff was ever made, there is no reason for disturbing the direction of the court, as to the allowance. Judgment affirmed, with costs.

JAMES S. FLYNN, respondent, *v.* THE NEW YORK ELEVATED R. R. Co., appellant.

Decided May 16, 1883. Appeal by defendant from order allowing plaintiff to discontinue the action against a co-defendant and allowing plaintiff to serve an amended complaint. Deyo, Duer & Bauerdorf, for appellant. Louis J. Grant, for respondent. Sedgwick, Ch. J., Truax and Ingraham, JJ., sitting. Per Curiam.—The present appellants had no interest in the discontinuance or maintenance of the action against their former co-defendants. The amendment allowed did not make in the amended complaint any other cause of action, than was relied on in the original complaint. The judge below had power to allow the amendment and it does not appear that his discretion in the matter was improperly exercised. Order affirmed, with \$10 costs.

JAMES H. CHAMBERS, appellant, *v.* WILLIAM H. APPLETON, *et al.*, respondents.

Decided May 16, 1883. Appeal from judgment dismiss-

June 2, 1883.

ing the complaint on the merits. Barnett & Saunderson, for appellant. Douglas Campbell, for respondents. Sedgwick, Ch. J., Truax and O'Gorman, JJ., sitting. No opinion. Judgment affirmed, with costs, on opinion of referee.

PATRICK RILEY, appellant, *v.* THE MAYOR, &C. OF NEW YORK, respondents.

Decided June 2, 1883. Appeal from judgment in favor of defendants, upon verdict directed by the court. Charles P. Miller, for appellant. George P. Andrews, counsel for the corporation, for respondents. Sedgwick, Ch. J., and Ingraham, J., held that the facts were the same as upon the former trial, and that the opinion of the former general term should be applied (see 48 *Super. Ct.* 274). O'Gorman, J., wrote dissenting opinion. Judgment affirmed, with costs.

JAMES TALCOTT, appellant, *v.* WALTER S. PIERCE, *et al.*, respondents.

Decided June 2, 1883. Appeal by plaintiff from a judgment for \$1,257.43, in his favor, entered on report of referee. Chambers, Baughton & Prentiss, for appellant. Man & Parsons, for respondents. Opinion by Ingraham, J.; Sedgwick, Ch. J., and Truax, J., concurred. Judgment affirmed, with costs.

CLINTON G. COLGATE, respondent, *v.* CONTINENTAL TELEGRAPH Co., appellant.

Decided June 2, 1883. Appeal by defendant from judgment entered on report of referee, in favor of plaintiff. Harry Wilbur, for appellant. Betts, Atterbury & Betts, for respondent. Opinion per Curiam.—Sedgwick, Ch. J., Truax and Ingraham, JJ., sitting. Judgment affirmed, with costs.

June 2, 1883.

HORACE K. THURBER, *et al.*, appellants, v. WILLIAM HUGHES,
respondent.

Decided June 2, 1883. Appeal by plaintiff from judgment entered on verdict of jury. Nelson Smith & Leavitt, for appellants. F. Smyth and Almon Goodwin, for respondent. Sedgwick, Ch. J., Truax and O'Gorman, JJ., sitting. Per Curiam.—The questions in this case were decided in favor of respondent by the general term on the former appeal (47 *Super. Ct.* 159), and no new questions are presented. Judgment affirmed with costs, and order affirmed with \$10 costs.

WILLIAM O. COOKE, respondent, v. THEODORE M. LEONARD, appellant.

Decided June 2, 1883. Appeal by defendant from order directing a reference to hear and determine and from order denying motion to modify the same. W. B. Putney, for appellant. E. G. Delany and W. H. M'Dougall for respondent. Sedgwick, Ch. J., Truax and O'Gorman, JJ., sitting. Per Curiam.—The form of the order directing the reference, the fact that a motion was made to re-settle the order, by striking some part from it and the affidavit used on the motion to re-settle, indicate that there was no opposition to the order of reference, as such, it should therefore be affirmed. It was, however, no part of such an order to prescribe that defendant should produce his book, and the direction "that defendants produce and submit their books of account to said referee on such accounting" should have been stricken from the order on the motion made for that purpose. Order of reference modified, as indicated above, without costs.

WILLIAM HACKETT, appellant, v. JAMES WEBB, *et al.*,
respondents.

Decided June 2, 1883. Appeal from judgment dis-

June 2, 1883.

missing the complaint at close of the case. James M. Smith and William Allen, for appellant. Robinson, Scribner & Bright, for respondents. Opinion per Curiam.—Sedgwick, Ch. J., Truax and Ingraham, JJ., sitting. Judgment affirmed, with costs.

CHARLOTTE M. WANDELL, respondent, *v.* BENJAMIN C. WANDELL, *et al.*, appellants.

Decided June 2, 1883. This is an appeal by defendants from an order denying defendants' motion for a bill of particulars of plaintiff's claim. The action is brought to recover damages for the alienation of the affections of the husband of plaintiff by defendants. T. Wandell and Jacob F. Miller, for appellants. J. Stuart Ross, for respondent. Sedgwick, Ch. J., Truax and Ingraham JJ., sitting. Per Curiam.—Order appealed from is affirmed with costs.

DYER PEARL, *et al.*, respondents, *v.* THE ROME, WATER-TOWN, & CO., R. R. Co., appellants.

Decided June 2, 1883. Appeal from order continuing an injunction *pendente lite*. Turner, Lee & McClure, for appellant. Stanley, Clark & Smith, for respondents. Sedgwick, Ch. J., Truax and Ingraham, JJ., sitting. Opinion per Curiam.—Order reversed with \$10 costs, and injunction granted vacated with \$10 costs.

ALBERT LUYSTER, respondent, *v.* WILLIAM L. HAGEDORN, appellant.

Decided June 2, 1883. Appeal from an order denying a motion to vacate an attachment against the property of the defendant. A. M. & G. Card, for appellant; Smith, Allan & Smith, for respondent. Sedgwick, Ch. J., Truax and Ingraham, JJ., sitting. Per Curiam.—The order appealed from is affirmed, with costs.

June 2, 1883—December 3, 1883.

JAMES M. TUTTLE, appellant, *v.* RICHARD P. ROTHWELL, respondent.

Decided June, 2, 1883. Appeal from order, vacating order of arrest. James H. Fay and Albert Stickney, for appellant. Abram Kling, for respondent. Sedgwick, Ch. J., Truax and Ingraham, JJ., sitting. Per Curiam.—We think the order appealed from should be affirmed, with \$10 costs and disbursements.

ROBERT J. GRAY, respondent, *v.* ALFRED J. LUCE, as assignee, &c., appellant.

Decided December 3, 1883. Appeal from judgment entered upon the verdict of a jury, and from order denying defendant's motion upon the minutes for a new trial. Collins & Corbin, for appellant. Jacob F. Miller, for respondent. Opinion by Freedman, J.; Sedgwick, Ch. J., and O'Gorman, J., concurred. Judgment and order appealed from affirmed, with costs.

THE WABASH, ST. LOUIS & PACIFIC R'y. Co., appellant, *v.* DAVID J. PHILLIPS, respondent.

Decided December 3, 1883. Appeal from judgment dismissing complaint with costs, at close of plaintiff's case. Charles N. Judson, for appellant. A. H. Berrick and Henry M. Goldfogle, for respondent. Opinion by Freedman, J.; Sedgwick, Ch. J. and O'Gorman, J., concurred. Judgment appealed from affirmed, with costs.

HENRY G. GOODWIN, *et al.*, appellants, *v.* LEOPOLD WERTHEIMER, Impleaded, &c., respondent.

Decided December 3, 1883. Appeal from judgment dismissing complaint with costs. Kelly and MacRae, for

December 3, 1883.

appellants; Melville H. Regensburger, for respondent. Freedman, J., wrote: "As to the merits this court has already decided (49 *Super. Ct.* 101) that the plaintiffs cannot recover against the defendant Wertheimer except upon proof of a demand of the property and a refusal by Wertheimer to comply. Upon the trial now under review the plaintiffs failed to supply this proof and hence the complaint was properly dismissed as to Wertheimer." O'Gorman, J., concurred. Judgment affirmed, with costs.

MYRA E. FAVOR, appellant, v. ANTHONY W. DIMOCK, *et al.*, respondents.

Decided December 3, 1883. Appeal from judgment for \$528.46 in favor of defendants, entered upon the report of a referee. Harry Wilber, for appellant. George Putnam Smith, for respondents. Freedman, J., wrote memorandum for affirmance. Sedgwick, Ch. J., and O'Gorman, J., concurred. Judgment affirmed, with costs on opinion of referee.

BERNARD HUGHES, appellant, v. JAMES CAMPBELL, respondent.

Decided December 3, 1883. Appeal by plaintiff from judgment dismissing complaint at close of plaintiff's case. Hastings & Southworth, for appellant. T. C. Ennever, and William H. Arnoux, for respondent. Freedman, J.—For the reasons given by the learned judge who presided at the trial, the complaint was properly dismissed. Sedgwick, Ch. J., concurred. Judgment affirmed, with costs.

ANN CASSIDY, respondent, v. PETER A. CASSIDY, appellant.

Decided December 3, 1883. Appeal from order of reference. John Tully, for appellant. Benno Loewy, and E. Arnstein, for respondent. Memorandum for affirmance by Freedman, J.; Sedgwick, Ch. J., concurred. Order affirmed, with costs.

December 3, 1883.

BENJAMIN L. LUDDINGTON, respondent, *v.* HEZEKIAH WATKINS, appellant.

Decided December 3, 1883. Appeal from order of special term, permitting plaintiff to prosecute this action for the recovery from the defendant of \$3,514.54 deficiency in foreclosure proceedings without prejudice to the proceedings already had herein. George W. Van Slyck, for appellant. George W. Lord, for respondent. Memorandum for affirmance by O'Gorman, J.; Freedman, J., concurred. Order appealed from affirmed, with \$10 costs.

LAWRENCE J. CALLAHAN, *et al.*, appellants, *v.* GEORGE F. GILMAN, respondent.

Decided December 3, 1883. Appeal by plaintiff from order vacating injunction. Edwin M. Wight, for appellant. Abbett & Fuller, for respondent. Sedgwick, Ch. J., Freedman and O'Gorman, JJ., sitting. Opinion per Curiam.—Order affirmed with \$10 costs.

MICHAEL L. DOYLE, *et al.*, appellants, *v.* GEORGE H. SHARP, respondent.

Decided December 3, 1883. Appeal by plaintiff, from order granting defendant leave to serve supplemental answer upon payment of \$10 costs. Arnoux, Ritch & Woodford, for appellants. Charles E. Whitehead and D. M. Porter, for respondent. Sedgwick, Ch. J., Freedman and O'Gorman, JJ., sitting. Opinion per Curiam.—Order modified as to conditions, without costs of appeal.

ROBERT J. DEAN, respondent, *v.* HENRY D. VAN NOSTRAND, *et al.*, appellants.

Decided December 3, 1883. Appeal by defendants from judgment entered upon verdict of jury, and from order

December 3, 1883.

denying motion for new trial. Marsh, Wilson & Wallis, for appellants. Edward S. Hatch, for respondent. Sedgwick, Ch. J., Freedman and O'Gorman, JJ., sitting. Opinion per Curiam.—Judgment affirmed with costs, and order affirmed with \$10 costs.

CAMPBELL PRINTING PRESS & MANUFACTURING Co., appellant, v. CHARLES R. PURDY, *et al.*, respondents.

Decided December 3, 1883. Appeal by plaintiff from order allowing defendants to amend their answer by setting up a new defense. Charles De Hart Brower, for appellant. R. H. Shannon and E. F. Bullard, for respondents. Sedgwick, Ch. J., and O'Gorman, J., sitting. Opinion per Curiam.—Order affirmed with \$10 costs

RICHARD DIXON, respondent, v. EUGENE W. GWINDON, appellant.

Decided December 3, 1883. Appeal by defendant, from judgment against them, entered on verdict of jury, and also from order denying motion for a new trial made upon the judges minutes. James Dunne, for appellant. Jesse W. Lilienthal, for respondent. Sedgwick, Ch. J., and O'Gorman, J., sitting. Per Curiam.—Judgment affirmed, with costs. Order appealed from affirmed, with \$10 costs.

GEORGE H. SEELEY, respondent, v. JAMES MORGAN, *et al.*, appellants.

Decided December 3, 1883. Appeal from order denying motion for extra allowance. E. S. Babcock, H. T. Ketcham, and Q. McAdam, for appellants. Stafford, Graff & Roman, for respondent. Sedgwick, Ch. J., and Freedman, J., sitting. Per Curiam.—The judgment having been reversed on plaintiff's appeal and a new trial ordered, the appeals taken by the defendants from the order denying their motions for an allowance should be dismissed without costs.

December 17, 1883.

LOUIS WILKEN, appellant, v. PHILIP BRAENDER, respondent.

Decided December 17, 1883. Appeal from judgment dismissing complaint with costs, at close of plaintiff's case. MacKinley & Altmayer, for appellant. Barlett, Wilson & Hayden, for respondent. Opinion by Freedman, J.; Sedgwick, Ch. J., and O'Gorman, J., concurred. Judgment affirmed, with costs.

INDEX.

ACCOUNT.

See DEMAND; PARTNERSHIP.

ACCOUNTING.

See PATENTS; TRUSTS, 1, 6.

ADMISSIONS.

Where the proof in an action of foreclosure clearly shows that the mortgage was usurious, a plea of tender of a certain amount in the answer cannot be held to constitute a conclusive admission that such an amount is due, the answer also setting up usury. *Breunich v. Weselmann*, 31.

See PARTNERSHIP.

ADVERSE POSSESSION.

1. It is not necessary, in order to establish title by adverse possession, to show that the inclosure relied on, was such an one as would prevent persons from climbing over or breaking in, but it must be a substantial inclosure, and one that will give notice to the world that the ownership of the property is claimed; and what is sufficient depends much upon the character of the property in each case. *Bolton v. Schriever*, 168.
2. The evidence in this case reviewed and considered by the court, and held sufficient to establish an "actual, open, continuous and hostile" possession, in defendant's grantors, of the premises in question for

twenty years under claim of title founded on written instrument. *Ib.*

AGENCY.

1. An agreement between A. and B. to supply B. malt to be manufactured into beer for A.'s benefit, A. to be paid with moneys realized from sales of beer, agreement accompanied by chattel mortgage on B.'s property does not constitute agency as to third parties,—*e. g.*, persons who supplied ice to B. for use in business,—and such agreement is not fraudulent, though chattel mortgage be not filed. *National Ice Co. v. Preston*, 482.

Commission merchants not guilty of conversion for failure to turn over specific proceeds. See Rosenberg v. Block, 488.

Undisclosed principal; execution of instrument by agent, when sufficient in form. See Adamson v. Elwell, 494.

See BROKERS.

AMENDMENTS.

1. The defendant's right to amend his answer as of course, is not waived by his service of notice of trial. Plaintiff has no right to demand that it be stricken out, unless put in for delay. *Duyckinck v. El. R. Co.*, 244.
- Amendment on trial of allegation as to time of employment. See McAleer v. Corning*, 522.

ANSWER.

1. Where the defendant pleads as a defense that the damages sought to be recovered were embraced in a judgment obtained in a former action, "which judgment still remains in full force and effect," and subsequently and before the time to amend as of course expires, serves a new answer omitting such defense, this will not be held inconsistent with, or a waiver of, a right of appeal from said judgment in such former action. *Prescott v. Tousey*, 53.
2. Where the sufficiency of a proposed supplemental answer setting up newly discovered facts, is a matter of doubt, the court will not pre-judge the validity of the defense on a motion, but will permit the defense to be set up if defendant be free from laches. *Tift v. Bloomberg*, 323.

See AMENDMENTS.

APPEAL.

1. Where the defendant pleads as a defense that the damages sought to be recovered were embraced in a judgment obtained in a former action, "which judgment still remains in full force and effect," and subsequently and before the time to amend as of course expires, serves a new answer omitting such defense, this will not be held inconsistent with, or a waiver of, a right of appeal from said judgment in such former action. *Prescott v. Tousey*, 53.
 2. It is the duty of the General Term, on appeal, to find whether or not the case as it was, supported the holding of the judge below,—e. g., that plaintiff was a partner—where the ground upon which the judge rested the holding as stated in the appeal book, is not sufficient to sustain it. *Arguimbo v. Hillier*, 253.
- Where plaintiff is entitled to costs, and General Term reversed judgment "costs to appellant to abide event," and court of appeals affirms original judgment "with costs," this means

only costs of the latter court. See *Murtha v. Curley*, 489.

Judges charge will be presumed correct when not set forth in appeal book. See *Smid v. Mayor*, 126.

Appeal from judgment only does not bring up decision of special term sustaining demurrer to answer. See *Loudriggan v. N. Y., &c. R. R. Co.*, 526; *Mudlock v. Van Kleeck*, 496.

Appeal from order granting temporary injunction will not be heard when it is merged in judgment entered. See *Health Dept. v. O'Reilly*, 524.

See GENERAL TERM; REFERENCE, 4, 5.

ARREST.

1. In an action upon contract against partners, to justify an arrest of any defendant, it is necessary to prove that he actually and individually participated in the fraud which is alleged to be connected with the contracting of the liability. *Bacon v. Kendall*, 123.
2. Where the fraud alleged is the purchase of goods when the firm was hopelessly insolvent, the concealment of said fact, and the intent not to pay for said merchandise,—each partner will be presumed to be acquainted with the accounts and affairs of the firm. *Ib.*
3. That one of the partners was served with summons in an action against the firm on a business indebtedness of a large amount, and long overdue, is a fact which makes strongly against him on motion to vacate an order for his arrest, upon the question of his belief in the firm's solvency. *Ib.*
4. *Semble*, that the failure of the judge granting an order of arrest to require from the plaintiff an undertaking in an amount at least equal to one-tenth of the bail required by the order, in compliance with § 599, Code Civ. Pro., is an error, rendering the order void for want of jurisdiction. *Godfrey v. Pell*, 206.
5. But such error is waived and cured where after arrest thereunder, defendant obtains an order to show

cause in which he claims relief in the alternative, either that the order should be vacated and set aside on the merits and for irregularity (which is not specified, as required by rule 37), or that the amount of bail required in said order be reduced, upon which application the bail is reduced to an amount bringing the plaintiff's undertaking within the requirements of § 599, Code Civ. Pro. *Ib.*

6. In case the affidavit on which an order of arrest is granted shows that the action is on contract where the defendant has been guilty of a fraud in contracting (Code, § 549, sub. 4), and it does not appear therein, that plaintiff has waived the contract, and elected to proceed for the fraud alone, in the absence of any allegation therein, showing that the complaint alleged that the defendant was guilty of a fraud in incurring the liability, no complaint having been presented upon the motion, the order of arrest must be vacated. *Lawrence v. Foxwell*, 278.

Allegations of false representations when sufficient to sustain orders; complaint, when may be treated as affidavit though irregularly verified. See Sanders v. Siebert, 491.

See MARRIED WOMAN.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

When demand must be shown against assignee, in action to recover goods alleged to have been obtained by false representations of his assignor. See Goodwin v. Goldsmith, 101.

ASSIGNMENT TO HINDER DELAY, &c., CREDITORS.

In an action against the sheriff to recover the possession of certain chattels alleged to have been wrongfully taken under an execution against a third party from whom plaintiff claimed title, where the evidence showed that the transfer to plaintiff was made by said judgment debtor in fraud of creditors

and was not followed by change of possession, &c., the judge charged the jury, in the language of the statute, that the transfer was presumptively fraudulent and void as against creditors, and that the presumption was conclusive unless it be made to appear on the part of the person claiming under the transfer, that it was in good faith, &c., to which plaintiff excepted. Plaintiff testified that the consideration was \$1000, and that he paid \$600 in cash, and the rest by satisfaction of an antecedent debt. There was no request to charge that if the jury believed the assignment to have been made for a valuable consideration; the burden was on defendants to show knowledge of fraudulent intent on plaintiff's part. *Held*, that a verdict for defendants should not be disturbed, and that the jury were not bound to believe plaintiff's testimony as to the cash payment, he being an interested party. *Further held*, that the burden was upon plaintiff to show that goods acquired after the transfer which were levied on by the sheriff, were paid for by plaintiff. *Hayes v. Reilly*, 334.

See EVIDENCE, 6.

ATTACHMENT.

1. The Code of Procedure, unlike the new code, makes no provision for successive levies under an attachment; but under either code the only property reached is that on hand at the time of the levy, which is perfected by service of the warrant and notice. *Gibson v. Nat'l Park Bank*, 429.
2. The certificate required in case there is property incapable of manual delivery, is of the property on hand when the levy is made, and it is no part of the levy and does not extend the effect of the service of the warrant and notice. *Ib.*
3. Where a bank certifies a check, and an attachment against the maker is thereafter served on the

bank, its right to pay the check to any person subsequently presenting it depends on his being a *bona fide* holder for value (*Bills v. National Park Bank*, 89 N. Y. 348, followed). Whether in the absence of suspicious circumstances the bank is authorized to consider anyone presenting the check a *bona fide* holder for value; or, whether it must in such case interplead the holder thereof, with the attachment creditor, *quære. Ib.*

4. The facts in this case considered and held, sufficient to show notice to the bank of absence of *bona fides*, &c. *Ib.*
5. The proper construction of § 5242, U. S. Rev. Stat., is that no attachment can be issued against a national banking association or its property after it has committed an act of insolvency, and the word "insolvency" therein has its usual and general meaning, viz.: a condition of inability to meet current pecuniary obligations. *Raynor v. Pac. Nat. Bank*, 119.
6. The fact that such a bank had stopped business for several weeks before, and did not do business for several weeks after the attachment was allowed, without clear explanation, raises an inference of insolvency. *Ib.*
7. Authority to do acts merely ministerial or mechanical may be delegated; and, accordingly, the sheriff may delegate to an assistant the power to certify a copy of a warrant of attachment, and make a notice thereof, as required by the Code of Civil Procedure. *Gibson v. Nat'l Park Bank*, 429.

Attachment creditor not in position to attack title of assignee of his debtor to chose in action. See Venable v. Bowery Ins. Co., 481.

ATTORNEYS.

1. Before the time to answer had expired, the parties hereto settled the cause of action for \$50, without the intervention of their attorneys. Plaintiff's attorneys claiming their compensation by agreement, to be

the taxable costs and the amount of the recovery on the cause of action above \$50, after the time to answer had expired, forthwith entered judgment for default of answer, for the full amount of the claim (\$87.50) besides interest and costs, and credited the \$50 as a payment thereon. It did not appear that defendant had notice of the lien of plaintiff's attorneys, nor was the good faith of the settlement impeached. On an appeal from an order denying a motion to open the default, the proposed defense being the settlement,—*Held*, that plaintiff's attorneys were not irregular in proceeding to judgment in the enforcement of their lien upon the costs; but that they had no authority to enter judgment for the full amount claimed, crediting the \$50 as a payment on account; and that the lien was upon the actual, not the alleged cause of action, and the attorneys could not claim the right to proceed with the action for the purpose of enforcing such asserted lien upon the cause of action, by showing the amount due to be greater than the parties had fixed it by their settlement. *Albert Palmer Co. v. Van Orden*, 89.

2. Where the sole evidence as to a demand is given by one of the attorneys for plaintiff, as he is not to be deemed a disinterested witness, and his credibility is a question for the jury, the court should not on his testimony withhold the question of the demand from the jury. *Goodwin v. Goldsmith*, 101.
3. An attorney who has recovered a judgment for his claim upon which he has a lien for professional services, may take an assignment thereof, together with the undertaking given in the action, in payment of said services, and may bring an action on such an undertaking in his own name. *Neueberg v. Schwab*, 232.

Extent to which an attorney can bind client by stipulations without his express assent or authority. See Metr. Concert Garden Co. v. Abbey, 294.
Contract between attorney and client for

the obtaining of a pardon from the governor, when not illegal. See Bremsen v. Engler, 172.

Right of attorney to issue body execution on judgment for costs, where there is agreement that costs shall belong to him. See Parker v. Speir, 1.

Counsel who draws proof claim in bankruptcy cannot be compelled to testify as to the matter; waiver of privilege. See Lockwood v. House, 500.

Action by client against attorney for alleged breach of duty claimed to have resulted in imprisonment of client on criminal charge. See Malone v. Sherman, 530.

See POOR PERSON.

BANKS AND BANKING.

1. The plaintiff, a depositor with defendant, intending to leave town, drew a check on April 20, payable to the order of A., his clerk, dating it the 22d, with instructions that if he did not return on that day A. should draw the money and give it to plaintiff's foreman for the purpose of paying workmen. On the 21st A. altered the check by erasure so that the date read April 21, indorsed it, presented it to the defendant, who paid him its amount. A. absconded with the money. In this action to recover the sum named in the check,—*Held*, that such amount should not have been charged against the plaintiff; that the taking of the check afterwards by the plaintiff for the purpose of prosecuting A., did not ratify the alteration, or estop him from bringing this action; and that the plaintiff was not guilty of laches in leaving the check with his clerk, nor in making it payable to his clerk's order. *Crawford v. West Side Bank, 68.*
2. The bank was bound, as against plaintiff, the depositor, to ascertain that the check was genuine in all respects, and when the date was forged, the check ceased to be the order of plaintiff. *Ib.*
3. *Susquehanna Bank v. Loomis (85 N. Y. 207); Hall v. Fuller (5 B. & C. 750)*, distinguished, upon the

ground that in the case at bar, there never was in existence a genuine instrument which could have justified the payment on plaintiff's account, on the day payment was made. *White v. Continental Bank (64 N. Y. 319); Marine National Bank v. National City Bank (59 N. Y. 67); and National Bank of Commerce v. National Mechanics' Banking Ass. (55 N. Y. 211)*, distinguished, upon the ground that the rule there laid down obtains only between the acceptor and the person to whom the bill is paid. *Ib.*

4. The proper construction of § 5242, U. S. Rev. Stat., is that no attachment can be issued against a national banking association or its property after it has committed an act of insolvency, and the word "insolvency" therein has its usual and general meaning, viz: a condition of inability to meet current pecuniary obligations. *Raynor v. Pacific Nat. Bk., 119.*
5. The fact that such a bank had stopped business for several weeks before, and did not do business for several weeks after the attachment was allowed, without clear explanation, raises a presumption of insolvency. *Ib.*
6. An instrument given by a firm of brokers, who also received deposits on demand, in the following form, viz: "Due A., Trustee, \$4,000, returnable on demand. It is understood that this sum is specially deposited with us and is distinct from the other transactions with said A."—is to be construed as a certificate of deposit of the sum named, with said firm, as bankers *pro hac vice*. *Smiley v. Fry, 134.*
7. No indebtedness arises by reason of said instrument, nor does the statute of limitations begin to run thereon until a demand for the return of the amount has been made. *Ib.*
8. An action on said certificate against the personal representatives of a deceased member of said firm and the surviving partner, in which the surviving partner is not served and

does not appear, is not a demand as against him. *Ib.*

9. *It seems*, that the rendition of a statement of account by the depositor to said firm in which the claim on said certificate is included under the head of "accepted charges," is not sufficient evidence of a demand to set the statute running. *Ib.*
10. Where a bank certifies a check, and an attachment against the maker is afterwards served on the bank, its right to pay the check to any one subsequently presenting it depends on his being a *bona fide* holder for value. Whether the bank in the absence of suspicious circumstances may consider any one a *bona fide* holder, or must interplead the holder with the attachment creditor, *quære*. *Gibson v. Nat. Park Bk.*, 429.
11. The facts in this case held sufficient to show notice to the bank of absence of *bona fides*. *Ib.*

BILL OF DISCOVERY.

See INSPECTION OF WRITINGS.

BILL OF PARTICULARS.

The complaint alleged that plaintiff was expelled from the New York Stock Exchange and deprived of his valuable rights as a member thereof, without any violation on his part of the rules of the association. The answer alleged that the said Stock Exchange is a voluntary unincorporated association having a constitution, etc., to which plaintiff pledged himself on becoming a member, and which provides that any member guilty of "obvious fraud," of which the governing committee shall be the judge, shall, on conviction be expelled, and his seat escheat to said exchange. *Held*, not a case in which defendant was entitled to a bill of particulars of the fraud alleged. *Solomon v. McKay*, 138.

BILLS, NOTES AND CHECKS.

1. The plaintiff, a depositor with defendant, intending to leave town,

drew a check on April 20, payable to the order of A.; his clerk, dating it the 22d, with instructions that if he did not return on that day A. should draw the money and give it to plaintiff's foreman for the purpose of paying workmen. On the 21st A. altered the check by erasure so that the date read April 21, indorsed it, presented it to the defendant, who paid him its amount. A. absconded with the money. In this action to recover the sum named in the check — *Held*, that such amount should not have been charged against the plaintiff; that the taking of the check afterwards by the plaintiff for the purpose of prosecuting A., did not ratify the alteration, or estop him from bringing this action, and that the plaintiff was not guilty of laches in leaving the check with his clerk, nor in making it payable to his clerk's order. *Crawford v. West Side Bank*, 68.

2. The bank was bound, as against plaintiff, the depositor, to ascertain that the check was genuine in all respects, and when the date was forged, the check ceased to be the order of plaintiff. *Ib.*
3. *Susquehanna Bank v. Loomis*, (85 N. Y. 207); *Hall v. Fuller* (5 B. & C. 750), distinguished, upon the ground that in this case, there never was in existence a genuine instrument which could have justified the payment on plaintiff's account, on the day payment was made. *White v. Continental Bank* (64 N. Y. 319); *Marine National Bank v. National City Bank* (59 N. Y. 67); and *National Bank of Commerce v. National Mechanics' Banking Ass.* (55 N. Y. 211), distinguished, upon the ground that the rule there laid down obtains only between the acceptor and the person to whom the bill is paid. *Ib.*

See STATUTE OF FRAUDS.

BONDS.

1. Where a bond is given upon opening a default, which bond is executed by the defendants against

whom judgment was entered and two sureties, and is conditioned for "the payment of any judgment which plaintiff may recover," etc., and two judgments are rendered, one against all of the defendants for a certain sum, and another against one of the defendants for a larger amount, payment of said judgment recovered against all of the defendants does not release the parties executing the bond from their liability to thereon as the remaining judgment. *Luce v. Alexander*, 202.

2. In an action on such a bond, it is not necessary that the complaint should show that plaintiff has exhausted his remedy against the principal. *Ib.*

3. A bond given in pursuance of an order or decree by a receiver to the clerk of the court, conditioned for the faithful performance of the receiver's duty, does not fall within the prohibition of the statute forbidding a sheriff or other officer to take any bond, obligation or security by color of his office, except such as are provided by law. *Titus v. Fairchild*, 211.

4. Where the penal sum in a receiver's bond is payable to "J. M. S., clerk of the superior court, etc.," without any words showing that the obligee's representatives are to succeed to his rights, and which shows on its face that it is given in pursuance of orders of the court, to secure the faithful performance of the receiver's duty, etc., said bond will not be construed to be an obligation to said J. M. S. individually, but will be held valid for the purpose for which it is given. *Ib.*

5. An action on such a bond is properly brought by the party interested, in his own name, after leave of court by order, under § 814, Code Civ. Pro. *Ib.*

6. The recitals in such a bond are *prima facie* evidence of the facts therein set forth, in an action thereon. *Ib.*

7. Where such a bond is conditioned that the receiver shall faithfully

execute his trust and make payments as directed by order of the court, it is sufficient to sustain an action for breach thereof, against the sureties, to prove orders granted upon notice to the receiver and after he had been heard, directing him to pay a certain sum to plaintiff, and adjudging him in contempt for failure to do so, and plaintiff need not prove that there are sufficient funds of the estate in the receiver's hands to meet his claim. *Ib.*

8. The ordinary bonds of a railroad company, secured by mortgage upon its property, are negotiable instruments, having all the attributes of such obligations, and the possession and production of them is *prima facie* evidence of title. *Northampton Bk. v. Kidder*, 338.

9. Where in an action to recover possession of such bonds, it appears that plaintiff was robbed of them prior to their negotiation to defendant, the burden of proof is shifted, and to overcome plaintiff's title defendant must show that he purchased such bonds in good faith, before maturity, and paid for them a valuable consideration. To do this defendant must show under what circumstances and for what value he became the holder, and it is not enough that he testify generally that he bought and paid for the bonds at a certain time. *Ib.*

BROKERS.

1. Where a broker is employed by his principal to sell certain bonds at the best market price at his discretion, using therein his best care and skill, his refusal, after informing the principal of the sale thereof, to disclose the time of the sale or sales and the amounts realized thereby, raises a presumption against him authorizing the strictest construction of the evidence as to amount, value and price, in an action by the principal to recover the amount received for said bonds. *Bats v. McDowell*, 106.

2. In such an action, where it appears

that the broker sold certain of his principal's bonds, and also certain of the same bonds in which he was personally interested, at a time when the market price was highest, and that the same had been so mixed and confused by him that he was unable to distinguish between them, the jury are at liberty to find that all the bonds sold were the principal's, up to the amount left by him with said broker, and that they were sold at the highest market price.

3. Where a broker fails to keep or produce accounts, all presumptions of value are against him. *Ib.*

4. In such a case, where said broker, subsequent to the sale of the bonds, enters into a copartnership with others, viz., his clerks and employees, the agreement providing that said broker should contribute to the firm all the assets and interest in his former business, and such firm thereafter render to the principal a statement of the transaction admitting a liability thereon, less than that claimed by the principal, and admit in their answer that they assumed the sum therein named as part of the liabilities of the original business, they thereby adopt the whole transaction as their own, and are liable for the whole amount due the principal under the above rules, in an action for money had and received. *Ib.*

5. The plaintiffs, as stockbrokers, were employed by defendant's testator to effect for him a "short sale" of certain stock, the agreements, as construed by the court, being that said brokers should also procure for said testator such stocks, by borrowing the same, or in some other way, to deliver to the purchasers. On October 29, 1880, said testator died, at which time the said stocks, so sold, for his account, were not purchased by his said brokers, and the transaction was not closed. The defendant became executrix, etc., December 29, 1880. On January 5, 1881, plaintiffs duly served on defendant a notice demanding a deposit of

margin, or a delivery to them of the shares of stock then short, on or before January 7, 1881, or in default thereof, that plaintiffs would purchase the same, etc. Defendant failed to comply with such demand, and plaintiffs accordingly purchased such stocks, incurring a loss upon the transaction, to recover which, this action was brought. *Held*, that the nature of the agreement was such that the death of defendant's testator did not wholly revoke plaintiffs' authority in the premises, and that a judgment in their favor should be sustained. *Hess v. Rau*, 324.

See JUDGE'S CHARGE; REFERENCE, 2.

BUILDING LAWS.

See OFFICERS.

BURDEN OF PROOF.

See ASSIGNMENTS TO HINDER, ETC., CREDITORS; BONDS, 9.

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See BANKS AND BANKING, 7-10.

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COMMERCIAL AGENCIES.

See EVIDENCE; FALSE REPRESENTATION; PLEADING, 6.

COMMISSION MERCHANTS.

Not liable in conversion for failure to turn over specific proceeds. See Rosenberg v. Block, 488.

CONSTITUTIONAL LAW.

See CONTEMPT, 4; TELEGRAPH COMPANIES, 2.

CONTEMPT.

1. Where on an examination of the sureties to an undertaking given on the arrest of defendant, it appears that such sureties were entirely irresponsible, and knew themselves to be so at the time they justified, they will be held guilty of a contempt of court. *Egan v. Lynch, 454.*
2. Though they may thereafter be

indicted for perjury, the court has power to attack and summarily punish them for their offense against its dignity, by imposing a fine sufficient to indemnify plaintiff for the loss he has suffered, and by imprisonment for six months and until the fine is paid. *Ib.*

3. If they are indicted for perjury, the court trying the indictment will, in passing sentence, take into account the previous punishment. *Ib.*

4. Such a commitment is not in violation of Art. I, § 2 of the State Constitution, nor of Art V. Amendments U. S. Constitution. *Ib.*

CONTRACTS.

1. When parties use a term which in itself, conveys no meaning, its meaning as used by them is to be determined by a reference to that which both had in mind when they used the term; and to this end the transactions leading up to the agreement, the positions thereafter taken by them, and their situation at the time, are to be considered. *Knapp v. Simon, 17.*
2. An agreement with an attorney-at-law to do what can legally be done to obtain from the governor a pardon or commutation of sentence of a person convicted of a crime, is not unlawful, and the attorney can recover for services rendered thereunder. *Bremsen v. Engler, 172.*
3. It will be assumed that an employment of an attorney to do *what he can* to obtain a pardon, &c., contemplates only such legal and proper acts as the law allows an attorney to agree to perform. *Ib.*
4. Where the defendants, who were book-publishers, employed the plaintiff to canvass for certain serial publications, under a written contract, in which they agreed to pay him "four dollars an order" for the subscriptions taken by him; in an action by plaintiff for his commissions. *Held*, that extrinsic evidence was admissible to show that said phrase had a well-settled meaning in the business, under-

stood by both parties, viz.: four dollars for each *bona fide* subscription taken for the whole work, after the subscriber had accepted and paid for ten parts thereof. *Newhall v. Appleton*, 238.

5. *Further held*, that the books of account of defendants, the publishers, containing statements of subscriptions obtained by plaintiff, and other agents, of which latter there was no proof that defendant had knowledge, were admissible in proof of the meaning of said phrase. *Ib.*

6. *Further held*, that in determining whether or not said phrase was so clear and definite that extrinsic evidence is inadmissible, regard must be had to the consideration that it was used in a contract which had pecuniary gain for its object and to describe the means by which it was to be reached. *Ib.*

7. Plaintiff sued to recover the contract price of certain bales of rags sold and delivered by him to defendant, who pleaded a counter-claim for damages for failure to deliver within the specified time, the remainder of said merchandise due under the contracts of sale, by which plaintiff agreed to deliver to defendant a certain number of bales by "prompt steamer shipment," which the evidence showed meant shipment within two weeks from receiving the order,—and also a certain number by "prompt sail shipment," which it appeared meant shipment within thirty days from the order. *Held*, that to meet the evidence establishing the counter-claim, plaintiff should have alleged and proved any condition of affairs which would have excused his performance of the agreement to deliver, and that defendant was not bound in order to establish his counter-claim, to show that there were opportunities of shipment of which plaintiff did not avail himself. *Phillips v. Taylor*, 318.

8. *It seems*, it is not error, in such a case, to charge that when plaintiff made the sale, he must be pre-

sumed to have the goods which he sold in hand, and to have provided facilities to comply with the contract as to shipment. *Ib.*

9. *Further held*, that in order to establish a waiver of the obligation to deliver at the time specified, there must be shown either such acts of defendant before the expiration of the time, as amount to an estoppel, or after the expiration of the time, an agreement founded on a new consideration. *Ib.*

10. C. purchased of the Mayor, &c., of the city of New York, the right to use for a term of years a certain pier for wharfage purposes, etc., which sale was made expressly subject to the published terms of sale, applying also to rights in other dock property sold at the same time, and which contained the following provisions: "The Department will make, either prior to the commencement of the lease in each case, or as soon thereafter as practicable, such repairs to any of the above-named premises in the judgment of the commissioners needing them, as they may consider necessary to place the premises in suitable condition for service during the term for which leases are sold; but all the premises must be taken in the condition in which they may be on the date of commencement of lease, and no claim that the property is not in suitable condition at the commencement of the lease will be allowed by the Department. . . . No claim will be received or considered by the Department for loss of wharfage, or otherwise, consequent upon any delay in doing the work of repairing, or consequent upon the premises being occupied for repairing purposes." In an action by the Mayor, &c., for rent falling due about a year thereafter, C. interposed a counter-claim for damages for failure to repair, etc., which the court refused to entertain, substantially, on the ground that there could be no recovery thereon, holding that evidence of the condition of the pier at the time of the com-

mencement of the lease was immaterial. *Held*, error that the above provisions in the terms of sale constituted a contract, under which the commissioners were bound to form judgment, which need not be oral or quasi-judicial, as to whether the pier in question was in need of repairs; that whether or not, this judgment was formed could be shown by circumstantial evidence including the force of legal presumptions, and evidence that the pier was in a plainly dilapidated condition, was of this character and therefore admissible. *Further held*, that the discretion of the commissioners as to the extent of the repairs to be made in each case was not absolute. *Further held*, that the clauses providing that no claim that the property is not in suitable condition at the commencement of the lease, nor for loss on account of "any delay" in making repairs, will be allowed, do not prevent a recovery herein. *Mayor v. Cooper*, 409.

Agreement to pay \$200 per month, \$100 to be spent in traveling expenses, detailed account of which is to be given, to be deemed absolute contract to pay \$200 per month. See Weiss v. Farrington, 512.

See DOMESTIC RELATIONS; INFANTS; INSURANCE; MUTUAL BENEFIT ASSOCIATIONS; PARTNERSHIP, 2; PATENTS; SALE; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS.

CONVERSION.

1. Where certain instruments in the form of bonds, signed and sealed by the proper officers of plaintiff, but not delivered, were entrusted to defendant, the president of the company, under a resolution directing him to sell the same at a certain price, and said defendant loaned them to one F., for the purpose of enabling F. to raise money to pay the company for certain of its bonds for which F. had subscribed and had not paid,—*Held*, a conversion by defendant, and

that the question of his general powers as president was immaterial. *Second Ave. R. R. Co. v. Mehrbach*, 267.

2. M. & K. as partners, obtained from defendant a policy of insurance on a certain vessel, which was made payable to the H. & H. Co., a mortgagee of said vessel, and delivered to said company, who, thereafter, and before the loss of said vessel allowed an alteration to be made by defendant the insurer, substituting for M. & K. one G. as the person for whose account the insurance was made, and making the surplus after satisfying the claim of the mortgagee payable to one B. In an action brought after a total loss of the vessel, *Held*, a conversion of the paper with the words thereon constituting the contract, but not of the incorporeal and inchoate right of action, that plaintiffs were not bound to recover possession, or make use of the paper; that though no proofs of loss, etc., had been filed a recovery could be had, as the damages arise from the tort which prevented plaintiff from suing on the policy. *Martin v. Tradesmen's Ins. Co.*, 416.

Commission merchants not liable for conversion for failure to turn over specific proceeds. See Rosenberg v. Block, 488.

See PLEADING, 11, 12; PLEDGE; SALE.

CONVEYANCE IN FRAUD OF CREDITORS.

See TRUSTS.

CORPORATIONS.

1. In an action by a corporation against its former president to recover damages for wrongfully making a contract on behalf of the company with a third party for the performance of certain labor, which was paid for at a stipulated price in the stock of the company at par, it being alleged that the work could have been executed at

- a cost to the plaintiff of one-half the contract price, of which defendant was aware, etc., and there being no proof that the capital actually owned by the company was of such value, that the stock was worth its face value. *Held*, that there was no conclusive presumption that the stock so claimed to be over-issued was worth its par value; and that the measure of damages, in case the action will lie, is the amount of money which plaintiff would have been able to obtain by issuing the said excess of stock, in case it had not been taken from it, through the contract. *Cont. Telegraph Co. v. Nelson*, 197.
2. The court has no jurisdiction over a foreign corporation in an action brought against it by a non-resident, except as provided for in section 1780 of the Code of Civil Procedure; and the objection to the jurisdiction may be taken at any time, although defendant has appeared generally, and put in an answer in which such objection is not taken. *Brooks v. Mex. Constr. Co.*, 234.
 3. Where certain of several joint plaintiffs, *e. g.*, joint owners of a vessel, for an injury, to which, beyond the jurisdiction of this state, the action is brought, are non-residents, and the remainder are residents, the objection to the jurisdiction still holds good. *Ib.*
 4. Where the transaction of certain business for the corporation by one of its officers is the subject of specific authorization by resolution, such resolution furnishes the measure of said officer's authority in regard thereto, though the matters in question may be comprehended by general powers conferred upon him. *The Second Ave. R. R. Co. v. Mehrbach*, 267.
 5. For the purposes of a suit against a third party upon a chose in action held by plaintiff as transferee from a corporation, it is enough if plaintiff prove an existing transfer, which, as against the corporation, vested him with title at the time of delivery or thereafter, though the corporation, its stockholders, or creditors may have had rights that would enable them to avoid or annul such transfer. *Sedley v. Morgan*, 346.
 6. Such an assignment which recites the receipt by the corporation of "valuable considerations," and is executed by the treasurer in the name of the company with the corporate seal, and duly proved by a commissioner's certificate, cannot be excluded, on the ground that the evidence shows lack of authority in the treasurer to act for the corporation, there being no proof that the corporation had disaffirmed his act, or offered to return the consideration, or that plaintiff knew of any informality or irregularity in the execution of the transfer. *Ib.*
 7. In such a case, the seal and the treasurer's signature are *prima facie* evidence of execution by proper authority, and there is a further presumption from the seal and the recitals, that the company received "valuable consideration," retention of which operates to estop it, as well as a defendant sued under such transfer, from asserting that it was invalid or had not been made. Nor can the transfer be attacked on the ground that in its execution the provisions of the by-laws and the statute under which the corporation was formed, regulating the manner of transacting its business, were infringed. *Ib.*
 8. *It seems* that a formal resolution of the directors made after the action upon such assignment is begun, ratifying the act of the treasurer in executing it, is sufficient proof of the existence of an assignment at the time of the beginning of the action. In any event it is admissible as evidence of an actual acquiescence in and ratification of such act before the action. *Ib.*
- When one is chargeable with notice of limitations of power of officer. See Hart v. Congregation, &c.*, 523.
- Manufacturing corporations; liability of trustees for failure to file report*

and for filing false report; nature of; may be enforced in same action; construction of statute; intent. See Butler v. Smalley, 492.

Ultra vires; contract by director to make in his own name investment beyond power of bank; when not enforceable. See Nassau Bank v. Jones, 498.

Agency cannot be established by declarations of assumed agent; ratification; admission by president of corporation, when not sufficient to constitute. See Taylor v. Second Ave. R. R. Co., 513.

Action to enforce stockholders' liability in case of non-payment of capital stock; when allegation in answer as to reduction of capital stock material to stockholder; allegation as to appointment of receiver, when not material. See Randall v. Havemeyer, 520.

See MUNICIPAL CORPORATIONS; MUTUAL BENEFIT ASSOCIATIONS; RECEIVER, 1; TELEGRAPH COMPANIES.

COSTS.

In discretion of court in special proceedings. See Matter of Dunham, 487.

Where plaintiff on entry of judgment is entitled to costs, and General Term reverses judgment, "Costs to appellant to abide event," and court of appeals affirms original judgments "with costs," such latter phrase refers only to costs in court of appeals. See Murtha v. Curley, 489.

See ATTORNEYS; REFERENCE, 4; SECURITY FOR COSTS.

COURTS.

The court has general power to relieve a party from stipulations. See Metr. Concert Garden v. Abbey, 294.

See GENERAL TERM.

COVENANT.

Covenant of landlord to make repairs by a certain date, when deemed broken. See Sparks v. Bassett, 270.

DAMAGES.

The complaint alleged that defendant negligently allowed sparks of fire to escape from one of its locomotives, which sparks entered plaintiff's house, setting fire to his curtains, furniture, &c., and that in his efforts to extinguish the fire, plaintiff's hand was burnt without any negligence on his part, &c., —Held, that upon the complaint, as framed, there could be no recovery for the personal injury, the damage being too remote. Hinchy v. Manh. R'y Co., 406.

Measure of damages in case of wrongful over-issue of stock. See Cont. Tel. Co. v. Nelson, 197.

Breach of covenant of landlord to repair by a certain date, at what time damages to be assessed. See Sparks v. Bassett, 270.

Architects' fees paid in anticipation of purchase, not recoverable as damages in action for breach of contract to convey real property. See Chamberlain v. Brady, 484.

Breach of contract to accept goods; evidence that plaintiff received for the unaccepted goods a higher price from a third party, when not admissible. See Canda v. Wick, 497.

Forcible entry and detainer; treble damages; value of period for which premises are detained, possibility if premises had not been detained, of longer letting than such period may be considered. See Kelley v. Sheehy, 518.

DEED.

Presumption from seal and recitals, as to consideration. See Seeley v. Morgan, 346.

DEFAULT.

Upon a motion to open a default for failure to answer, strict practice requires that a copy of the proposed answer be served with the moving papers, but upon appeal it will be held sufficient if the papers, including the order to show cause, show upon their face the nature of the proposed defense, and that it is good and sufficient; e. g., a settle-

ment between the parties before the expiration of the time to answer. *Albert Palmer Co. v. Van Orden*, 89.

Bond on default, when satisfied; the judgments being recovered after default is opened. See Luce v. Alexander, 202.

DEMAND.

1. *It seems*, that the rendition of a statement of account by the depositor to a firm in which the claim is included under the head of "accepted charges," is not sufficient evidence of a demand to set the statute running, on a certificate of deposit. *Smiley v. Fry*, 131.
2. An action on said certificate against the personal representatives of a deceased member of said firm and the surviving partner, in which the surviving partner is not served and does not appear, is not a demand as against him. *Ib.*

Against whom demand must be shown in action to recover goods alleged to have been obtained by false pretences. See Goodwin v. Goldsmith, 101.

DEMURRER.

Appeal from judgment only, does not bring up decision of special term, sustaining demurrer to answer. See Londrigan v. N. Y. & C. R. R. Co., 526; *Maddock v. Van Kleeck*, 496.

DEPOSIT.

See TRUSTS, 5.

DEVISE.

Real property devised, when liable for debts of deviser. See Traud v. Magnes, 309.

DISCRETION.

An order permitting one to sue in forma pauperis is within the discretion of the court. Joyce v. Cooper, 115.

When within discretion to deny reference of long account. Day v. Jamison, 373.

Costs in special proceedings in discretion. Matter Dunham, 487.

See SPECIAL ISSUES; SPECIFIC PERFORMANCE.

DOMESTIC RELATIONS.

An agreement to pay for board will not be implied where a son and his family are living with the son's father. *Wotherspoon v. Wotherspoon*, 152.

EASEMENTS.

See TITLE.

EJECTMENT.

Statement of two sources of title in complaint, when not objectionable. See Rank v. Grote, 502.

EQUITY.

See REFERENCE; SPECIFIC PERFORMANCE; STOCK EXCHANGE.

ESTATES.

Tenancy by entirety does not exist. See Zornlein v. Bram, 476.

ESTOPPEL.

When corporation estopped from denying execution of instrument, and authority of its officer to execute it. See Seeley v. Morgan, 346.

Where one serves notice that license under patent is revoked, and licensee continues to manufacture, he is not barred from an accounting therefor. See Hyatt v. Ingalls, 375.

See USURY.

EVIDENCE.

1. The courts will take judicial notice of the business and office of commercial agencies established for the purpose of furnishing information as to the credit and standing of business men. *Macullar v. McKinley*, 5.

2. In an action against defendants to recover for damages from an accident happening from defendants' interference with the highway, evidence to show that on the night of the accident a watchman employed by defendants, stated "that it was his last night as watch, and he didn't think it worth while to put lamps out on the holes," is inadmissible against said defendants. *Flynn v. N. Y. El. R. R. Co.*, 60.
3. Where plaintiff reads in evidence a portion of the separate answer of a defendant as to certain matters therein admitted, the objection of the co-defendants that all of the answer upon the same point should have been read, is waived by their examination at large of said answering defendant on the same subject. *Bate v. McDowell*, 106.
4. Evidence that a passer-by, immediately after the happening of the accident in question, slipped and fell on the same spot, is inadmissible as tending to show the dangerous condition of the street. *Smid v. Mayor*, 126.
5. A line of examination cannot be allowed, which in effect puts in evidence the affidavit of a witness made a long time previous to the trial, instead of his direct oral statement of his present recollection of the facts therein deposed to. *Hubbell v. Bowe*, 131.
6. In an action by an assignee for the benefit of creditors against the sheriff to recover possession of certain goods taken by the latter, in which the sheriff justifies under certain attachments against the plaintiff's assignor, and claims that the assignment was void as being in fraud of creditors,—evidence is admissible in behalf of plaintiff to show that the creditors who had attached were present at a meeting of creditors, at which, upon plaintiff's announcing that he intended to withdraw from the trust, a unanimous resolution was passed requesting him to remain. Such evidence tends to show a waiver by said attaching creditors, of their right of priority. *Per O'GORMAN, J. Ib.*
7. Where a witness swears that he addressed a letter to the defendants, and put it in the general post office, and the sole objection made to the reading of said letter in evidence, is that there is no proof of its receipt, its admission is correct, and such ruling cannot be attacked on appeal on the ground that it was not shown that the address was correct nor that the postage was paid. *Austin v. Hartwig*, 256.
8. Where the question as to which an expert is called to testify is as to the marketable quality of certain merchandise, *e. g.*, sauerkraut, and he testifies that part of his business is to deal in, and buy and sell it, and to examine it to see if it is fit for sale, his testimony as properly admitted though he states therein, of himself, that he is not an expert. *Ib.*
9. The city ordinance relating to the protection of elevators, etc., is admissible as a fact, upon which, with the others it may be determined whether defendant is negligent in leaving open a door leading to the elevator. *Dawson v. Sloan*, 304.
10. In an action against a railroad company for damage to plaintiff's eye by a cinder, evidence that since the occurrence, cinders had not fallen to so great an extent as before, was admitted as tending to show that some contrivance could have been adopted to prevent the same from falling. *Held*, not error. The court refused to allow defendant to ask its master mechanic in cross-examination, whether the devices used by it to prevent the escape of sparks, were not the best known. *Held*, not error; that the question as put, was not sufficiently specific, and the jury should have been informed as to what the devices actually were. *Searles v. Manh. El. R'y Co.*, 425.
11. Where the defendants, book-publishers, employed the plaintiff, to canvass a certain serial publications under a written contract in

which they agreed to pay him "four dollars an order" for the subscriptions taken by him. *Held*, that extrinsic evidence was admissible to show that said phrase had a well-settled meaning in the business, understood by both parties, viz.: four dollars for each *bond fide* subscription taken for the whole work after the subscriber had accepted and paid for ten parts thereof. *Newhall v. Appleton*, 238.

12. *Further held*, that the books of account of defendants, the publishers, containing statements of subscriptions obtained by plaintiff and other agents, of which there was no proof that defendant had knowledge, were admissible in proof of the meaning of said phrase. *Ib.*

13. *Further held*, that in determining whether or not said phrase was so clear and definite that extrinsic evidence is inadmissible, regard must be had to the consideration that it was used in a contract which had pecuniary gain for its object and to describe the means by which it was to be reached. *Ib.*

14. It seems that a formal resolution of the directors made after the action upon such assignment is begun, ratifying the act of the treasurer in executing it, is sufficient proof of the existence of an assignment at the time of the beginning of the action. In any event it is admissible as evidence of an actual acquiescence in and ratification of such act before the action. See *Seeley v. Morgan*, 346.

15. In an action for breach of an obligation on the part of a municipal corporation involving knowledge of certain facts its ordinances are competent evidence, when they show such knowledge or notice. *Stillwell v. Mayor*, 360.

16. Though it be taken as the rule that on a motion for nonsuit, the most favorable view of the facts possible should be taken in behalf of plaintiff, yet in ascertaining what the facts are, if a fact is stated in a way most favorable to

plaintiff by herself as a witness, and she afterward qualifies or contradicts the former testimony, she neutralizes in whole or in part that testimony, so that it cannot be considered as establishing the fact. *PER SEDGWICK, Ch. J. Hurnett v. Bleecker St. R. R. Co.*, 185.

Privilege of party examined before trial. See *Canada Shipping Co. v. Sinclair*, 242.

Evidence of similar false representations about the time of the one complained of, when admissible. See *Goodwin v. Goldsmith*, 101.

Admission as to length of time of employment, what constitutes, "City Record," statements in as evidence against City. See *Brandt v. Mayor*, 507.

Examination before trial, exclusion of testimony taken in, when not error at the trial. See *Driehler v. Van Den Henden*, 508.

See SPECIFIC PERFORMANCE.

EXAMINATION BEFORE TRIAL

1. If the papers upon which is granted an order for the examination of a party before trial, show upon their face that it is to be used not to obtain evidence for the trial, but for another object, the order should be vacated. Whether this so appears is to be ascertained by construing the affidavit as a whole. *Gilbert v. Third Ave. R. R. Co.*, 129.

2. The affidavit upon which the order for the examination of defendants to enable plaintiff to frame its complaint, was granted, showed that plaintiff, as common carrier, had a special property in certain goods which were stolen from it, and thereafter a portion of the same came into the possession of defendants, and that the action was brought to recover the same or its value; that plaintiff was unable to state the number of bales, their weight, etc. *Held*, that in this case, the order should not be set aside on the ground that the testimony to be given

would make defendants liable to indictment for receiving stolen goods, but defendant should be left to take the objection on the examination. *Canada Shipping Co. v. Sinclair*, 242.

EXECUTION.

Under the authorities, where there is an agreement between the defendant and his attorney that the costs if recovered shall belong to the latter, the action being in tort and one in which defendant might have been arrested, said attorney may issue an execution against the body of plaintiff upon a judgment for costs on a dismissal of the complaint, though such judgment has been theretofore assigned by said defendant to plaintiff's attorney. But the reason of the authorities questioned. *Parker v. Speer*, 1.

EXECUTORS AND ADMINISTRATORS.

When the devisee of real property aliens the same before her death, her personal representative is liable, in a proper case, under art. 2, tit. 3, ch. 8, part 3, R. S., for the debts of her deviser to the same extent that said devisee was in her lifetime, viz., to the extent of the value of the real property so aliened. *Traud v. Magnes*, 309.

As to liability of personal representative of deceased partner for firm debts. See *Fogarty v. Cullen*, 397.

See HUSBAND AND WIFE.

EXPERTS.

See EVIDENCE.

FALSE REPRESENTATIONS.

1. To hold a defendant liable for an alleged false representation as to his financial standing made to a commercial agency, the evidence must show that he was the responsible cause of the plaintiff's relying on the statement, and ordinarily

this will be shown by the fact of the making of the representation. But such representation will hold against defendant only as to sales made within such time as, according to the custom of the agency, would elapse before another application is made to him, and another statement procured. *Macullar v. McKinley*, 5.

2. Where defendant, in February, made statements to a commercial agency tending to show his financial responsibility at the time, but also showing that his credit was not strong, which facts upon application were communicated to plaintiffs, and on the faith of which they sold to defendant goods at divers times, all of which were paid for up to the ensuing June, when defendant, being again applied to by said agency, declined to make any statement, which fact was put upon the records of the agency, with other information tending to show that defendant's standing and credit were not good, the evidence showing that it was the custom of the agency to supply its information only upon application therefor. *Held*, that as to sales made to defendant by plaintiffs after such second interview in behalf of the agency, plaintiffs were not induced by him to rely upon the statement of February by itself, but upon it and such further statements as would be made in the usual course of business; that from the two statements, it appeared that the defendant did not claim credit upon any implied assertion that his first statement held good. *Further held*, that the complaint was properly dismissed. *RUSSELL, J.*, dissented. *Id.*

3. In an action brought to recover the possession of certain goods alleged to have been obtained by false representations, as against one who innocently took and held said goods as assignee for the benefit of creditors of the vendee, a demand must be shown; but in such case no demand is necessary, as against the vendees who made

the assignment. *Goodwin v. Goldsmith*, 101.

4. That the assignee in such case claims in his answer to own the goods, and through the sheriff takes them, does not obviate the necessity of proving a demand on him. *Ib.*
5. In such an action the evidence showed that four or five months previous to the sale in question, defendants stated to a commercial agency that their liabilities were \$4,500, and their assets \$35,000, which statement was false, and known by defendants to be so; that the statement was made with intent to deceive; and that learning of this statement and relying upon it, etc., plaintiffs made the sale in question to defendants upon credit. *Held*, that plaintiffs had a right to presume that defendants solvent condition would continue to the time of the sale, and that if defendants fraudulently concealed their insolvency from plaintiffs, the sale was void. *Ib.*
6. Evidence was admitted showing that defendants made similar representations to other persons about the time of that in question here. *Held*, no error. *Ib.*

Statements as to matters known to both parties. See 23d St. R. R. Co. v. Bay Ridge Ferry Co., 485.

See PLEADING, 3-6.

FORCIBLE ENTRY AND DETAINER.

Forcible entry and detainer; treble damages; value of period for which premises are detained, possibility if premises had not been detained, of longer letting than such period may be considered. See Kelley v. Sheehy, 518.

FORECLOSURE.

1. Appellant, the owner of certain premises, leased the same, and her lessee thereafter sub-let the premises and mortgaged the original lease. The parties entitled to the

rents under the sub-leases assigned them to trustees for distribution in certain ways, and in an action to foreclose said mortgage such trustees were made receivers, to hold the rents, etc., subject to the judgment of the court. *Held*, in said action that appellant (the original lessor), was not entitled to a direction in the judgment that such receivers pay to her out of the fund the whole amount of her rent in arrear; that she had no lien upon such fund for rent due her, except as given by special agreement with the parties entitled to the rents under the sub-leases. But, *it seems*, that the judgment should have contained a direction that said arrears be paid out of the proceeds of the sale under the judgment; this, as a protection against the exercise of appellant's right of ending the term for non-payment of rent, etc. *Stillman v. Van Beuren*, 86.

2. Where the said trustees were directed by the assignment to apply the rents received by them from the sub-leases to the payment due appellant on the original lease, and provided that "only \$1,500" per annum should be so applied. *Held*, that appellant was not entitled to interest on said \$1,500, as if it were a debt due on an independent obligation; that it was to be considered part of a fund. *Ib.*
3. The owner of real property, parcel B, subject to a mortgage which also covers other property, parcel A, in which last-named property he has no interest, is not a necessary party to an action to foreclose a prior mortgage on said parcel A; and though the said parcel A be sold under the decree for such sum as leaves nothing to be applied on the second mortgage, covering also plaintiff's premises, he cannot, by virtue of his said ownership of parcel B, be allowed to come in and redeem. *Barnes v. Decker*, 221.

See USURY.

FOREIGN CORPORATIONS.

Right to take advantage of statute of limitations in action against it for causing death. See Londrigan v. N. Y., &c. R. R. Co., 526.

See CORPORATIONS.

FORGERY.

See BANKS AND BANKING.

FRAUD.

See AGENCY; ARREST; ASSIGNMENTS TO HINDER, ETC., CREDITORS; BILL OF PARTICULARS; FALSE REPRESENTATIONS; PLEADING, 9, 10; SPECIFIC PERFORMANCE.

GENERAL TERM.

Where a verdict is ordered subject to the opinion of the court at general term, the whole case is before the general term on its merits and no new trial can be ordered. *Northampton Bk. v. Kidder, 338.*

GIFT.

See TRUSTS, &c., 3; HUSBAND AND WIFE, 508.

GUARANTY COMPANIES.

The corporations which, under chapter 468 of the Laws of 1871, are vested with authority to guarantee bonds and undertakings in judicial proceedings, need not possess the qualifications required of sureties by the Code, though the manner of justification is the same; but it is the duty of the judge to whom the undertaking or bond is presented for approval, to exercise his discretion in such particular case as to whether the actual statement of the company's business justifies an approval. *Earl v. Earl, 57.*

GUARDIAN.

Guardian ad litem; failure to notify natural guardian of application for, cannot be taken advantage of upon the trial. See Drischler v. Van Den Henden, 508.

HEIRS.

Under said statute, real property which has been devised, and has descended upon the death of the devisee to her heirs, may be subjected to the payment of the devisor's debts in like manner as before the death of said devisee. *Traud v. Magnes, 309.*

HUSBAND AND WIFE.

1. Where G., a married women, placed into the hands of the defendant, an undertaker, a certain sum of money with the direction and upon the condition that the same should be used by the defendant in the first instance, for the purpose of defraying the expenses of her funeral and that of her husband and of the erection of a suitable monument to their memories, and in the second place, to have masses said by a Roman Catholic priest for the repose of their souls; and Mrs. G. thereupon died intestate and without issue; and subsequently the husband died intestate and without having taken out letters of administration upon her estate or having reduced the money to possession; and thereafter the plaintiff, as administrator of the estate of the husband brought an action to compel the defendant to account. *Held*, that upon the death of the wife the surviving husband at common law acquired the right to administer upon her estate for his benefit, subject only to the payment of her debts, and that this right has not been abridged by statute in the case of the death of a married woman intestate and without issue. That by statute the husband, upon the death of the wife, became entitled to adminis-

traton upon her estate in preference to any other person. That upon the death of the husband his right passed to his legal representative, and the plaintiff, as the administrator of the husband's estate, in his representative capacity as such, might have had letters of administration upon the estate of the wife, but such letters were not necessary to enable him to maintain the action. *Gilman v. McArdle*, 463.

2. Tenancy by entirety does not exist. *Zornlein v. Bram*, 476.
3. Manual possession of property of deceased husband by wife does not show, *prima facie*, a gift. *Driechler v. Van Den Henden*, 508.

See MARRIED WOMEN.

INFANTS.

1. A chattel mortgage made by an infant in the course of his business, upon which he depends for support, and to enable him to carry on the same, is voidable only and not void. *Hangen v. Hachmeister*, 34.
2. Where one who has purchased, with notice, the mortgaged property from the personal representative of the infant, who died during his infancy, brings an action to recover damages for an alleged conversion of the property which was after said purchase, taken possession of by the mortgagee under the mortgage, the amount advanced thereon must be refunded before it can be avoided. *Ib.*
3. It is only where it affirmatively appears that the infant has squandered or lost the property during infancy, and is unable to refund, that the court will not compel him, or those claiming under him, to refund in a case of this character. *Ib.*
4. The principles and authorities in regard to acts of infants, and the rule in regard to executed and executory contracts made by them, reviewed at length by the court. *Ib.*

See SECURITY FOR COSTS.

INJUNCTION.

1. To justify granting a preliminary injunction, the plaintiff's rights must be certain as to the law and the facts; and where, in an action for an injunction, the grounds of the preliminary order are not stated therein, and it appears from the complaint that the propositions of law upon which plaintiff's claim rests are doubtful, the order should be vacated. *Noonan v. Grace*, 116.
2. In case of an injunction *pendente lite* against the doing acts based on an act done, which is illegal as contravening a positive statute, a dissolution will not be granted, either because the plaintiff's pecuniary interest is small, or because the injunction will afford him but little protection or relief, or the denial of it inflicts on him but little injury, or because persons through the act done have *bona fide* acquired rights and an interest in having the acts done which are sought to be restrained, or because the statute violated by the doing of the act done has prescribed the appropriate and only remedy therefor, or for all these reasons combined. *Williams v. Westn. Un. Tel. Co.*, 140.
3. That the plaintiff has some pecuniary interest, however small, in having the acts restrained, and that the restraint may afford him some protection or relief is sufficient to uphold it. *Ib.*

Appeal from order granting temporary injunction will not be heard when merged in judgment granting permanent injunction. See Health Dept. v. O'Reilly, 524.

See PATENTS; STOCK EXCHANGE; TELEGRAPH COMPANIES.

INSOLVENCY.

See BANKS AND BANKING, 5, 6.

INSPECTION OF WRITING, &c.

1. The provisions of the Code have not changed the chancery rule in regard to a bill of discovery, viz.

that plaintiff may have a discovery of matters necessary to maintain his own title, but is not entitled to a discovery of the title of his adversary, which he denies, and that only where plaintiff is entitled to the discovery of deeds, etc. for the purpose of establishing his own case that his right to the discovery will not be affected by the fact that the same deeds, etc., are evidence of defendant's case. *Shoe and Leather Asso. v. Bailey*, 385.

2. Where the action is brought to recover the amount of a balance of moneys, alleged to have been received by defendant as plaintiff's agent, and the complaint is drawn upon the face of certain accounts so rendered by defendant, he is entitled to an inspection of the same, and of the vouchers filed by him in support thereof, to enable him to frame his answer. *Inyo Ming. Co. v. Pheby*, 392.
3. Though the complaint contain an averment that defendant "refuses to pay said balance, and has converted the same to his own use," it will not be held on a motion for inspection, etc., that the averments as to the accounts are immaterial for the purposes of defendant's said motion. *Ib.*
4. In such a case defendant should be allowed an inspection of his books of account as such agent, if necessary, to enable him to meet the appearance of the accounts set forth in the complaint, and make a substantial allegation as to what the accounts altogether showed. *Ib.*
5. That it is alleged that such books were falsely and fraudulently made up by defendant renders it the more proper to grant an inspection. *Ib.*

INSURANCE.

(MARINE.)

In an action to recover on a policy of marine insurance where the answer admits the making of a contract of insurance according to the conditions, &c., contained in said contract, and alleges that among others

was a stipulation that the lighter insured, in the performance of her voyage, should not "sail to, touch or stay at any ports, &c., unless thereto obliged by stress of weather, or other unavoidable accident," and further alleges a breach of said condition; the only proof of the contract of insurance being the following certificate issued to plaintiff: "This certifies that N. J. L. Co. are insured under and subject to the conditions of open policy No. A. issued by this office, in the sum of \$2,500 on railroad iron on board the lighter Hebe, at and from Norwalk, Conn., to Jersey City, N. J., loss, if any, payable to them or order hereon and return of certificate. \$2,500, at $\frac{1}{4}$ per cent. premium, \$6.25." It appeared upon the trial that said policy No. A. was in the personal possession of one of defendant's witnesses then present. *Held*, that the certificate itself sufficiently sets forth a contract of insurance binding upon defendants, and that if they desired to take advantage of any conditions not contained in said certificate, it was their duty to put in evidence said policy No. A.; that the question of "deviation" must be determined by the motives, ends and consequences of the act, and the fact that the deviation in this case was from necessity, would excuse the insured, even if the conditions in that regard were proven. *N. J. Lighterage Co. v. N. Y. Mut. Ins. Co.*, 165.

2. The complaint in an action on a policy of marine insurance alleged a partnership interest in the vessel, and the proof showed that whatever interests defendants possessed, if any, was individual. *Held*, that the complaint was properly dismissed. *Martin v. Tradesman's Ins. Co.*, 416.
3. M. & K. as partners, obtained from defendant a policy of insurance on a certain vessel, which was made payable to the H & H. Co., a mortgagee of said vessel, and delivered to said company, who, thereafter, and before the loss of said

vessel allowed an alteration to be made by defendant, the insurer, substituting for M. & K. one G. as the person for whose account the insurance was made, and making the surplus after satisfying the claim of the mortgagee payable to one B. In an action brought after a total loss of the vessel, *Held*, a conversion of the paper with the words thereon constituting the contract, but not of the incorporeal and inchoate right of action, that plaintiffs were not bound to recover possession, or make use of the paper; that though no proofs of loss, &c., had been filed, a recovery could be had, as the damages arise from the tort which prevented plaintiff from suing on the policy. *Ib.*

INTEREST.

See FORECLOSURE, 2.

INTERPLEADER.

Motions for, rest on same principles as actions for. See *Venable v. Bowery Ins. Co.*, 481.

BANKS AND BANKING, 11.

JUDGE'S CHARGE.

Charge under issue whether certain goods were bought by plaintiff as broker for defendants, or on his own account and by him sold to defendants. See *Knapp v. Simon*, 17.

Will be presumed correct when not set out in appeal book. See *Smid v. Mayor* 126.

Charge that plaintiff must maintain this case by "uncontradicted evidence," when specific objection must be made. See *Hazewell v. Coursen*, 478.

See ASSIGNMENTS TO HINDER, &c.,
CREDITORS; NEGLIGENCE, 3;
TRIAL.

JUDGMENT.

A motion to reopen a judgment, addressed to the discretion of the court, should not be granted where the applicant fails to establish

either default, surprise, inadvertence or excusable neglect. *Melville v. Matthewson*, 388.

What a sufficient recognition of to constitute waiver of right of appeal. See *Prescott v. Tousey*, 53.

That assignment of judgment carries rights under undertakings in suit. See *Newburg v. Schwab*, 232.

See FORECLOSURE; PATENTS; TRIAL.

JURISDICTION.

See CORPORATIONS; PATENTS; SUPPLEMENTARY PROCEEDINGS.

JUSTIFICATION.

See GUARANTY COMPANIES.

LANDLORD AND TENANT.

Where the landlord covenants with the tenant to make certain repairs upon the demised premises on or before a specified date, the damages to the tenant for failure to fulfill such promise are to be assessed as of the time of the breach, viz., the date specified for making said repairs; and where the tenant has suffered no special injury, they are limited to such an amount as would compensate him for himself making such repairs, notwithstanding that he may have been obliged to pay a third person damages caused after said date by failure to make such repairs. *Sparks v. Bassett*, 270.

LEASE.

Mortgage of lease after subletting of premises; lien on rents; receiver, etc. See FORECLOSURE.

Warranty that premises are habitable, when not warranty that they will continue so. See *Fowler v. Stevens*, 479.

Lease for five years; letter containing other requisites and signed by party to be charged, alluding to premises only, "as I described them," is insufficient. See *Jarboe v. Mulry*, 525.

LICENSE.

See NEGLIGENCE 1, 2; PATENTS.

LIEN.

See ATTORNEYS; FORECLOSURE.

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

MARRIED WOMAN.

1. A married woman may be arrested in an action for damages for willful injury to property, done by her in the management of her own separate business. *Muser v. Miller*, 458.
2. The reason of the common law rule in regard to joinder of the husband in actions against the wife, has ceased to exist and the rule itself has been abrogated, in cases of torts and contracts affecting the separate property of the wife, as connected with or arising from the management or control of her own business; and the exemption of married women from arrest in such actions, which sprang solely from the reason of the rule, has ceased in all cases where the law in general terms allows a woman to be arrested. *Ib.*
3. Willful injury to property, does not incur, under § 553 Code Civ. Pro., an injury merely to the thing itself, but also an injury to the owner's right in and to the thing. *Ib.*

MASTER AND SERVANT.

1. The plaintiff, while engaged as a servant of defendants, in operating a derrick used by them in the construction of a certain building, received severe injuries, resulting from the slipping of the derrick from its place while in use. The accident was caused by the stretching of the guy ropes, which held the derrick in place, from rain which fell the night before the morning of the accident, it having been in use for some time—and there was evidence that the accident might have been prevented by proper precautions. It was entrusted to defendants' foreman to

construct and rig the derrick, and on the morning in question he superintended the starting of said derrick, immediately prior to the happening of the accident. The complaint was dismissed at the trial. *Held*, error; that it was the continuous duty of defendants to furnish to their employees a properly rigged derrick, and to maintain it in such condition; and that the negligence of the foreman in that regard was defendants' negligence, and not that of a fellow-servant of plaintiff. *SEDGWICK*, Ch. J., dissenting, *held*, that in entering upon his employment, plaintiff accepted the risk involved in changing the derrick from time to time, and could not rely upon defendants' undertaking to arrange it upon each occasion of its use. *Courtney v. Cornell*, 286.

See RAILROADS.

MISTAKE.

See SPECIFIC PERFORMANCE.

MORTGAGE.

The owner of real property, parcel B, subject to a mortgage which also covers other property, parcel A, in which last-named property he has no interest, is not a necessary party to an action to foreclose a prior mortgage on said parcel A; and though the said parcel A be sold under the decree for such sum as leaves nothing to be applied on the second mortgage, covering all plaintiff's premises, he cannot, by virtue of his said ownership of parcel B, be allowed to come in and redeem. *Barnes v. Decker*, 221.

MORTGAGE OF LEASE.

See FORECLOSURE; USURY.

MOTIONS AND ORDERS.

A motion addressed to the discretion of the court cannot be renewed upon the same or substantially the same state of facts, unless leave thereto has been obtained; and failure to obtain such leave furnishes ground for reversal of the

order granted on the second application. *Melvills v. Matthewson*, 888.

Reopening of judgment. See *Melville v. Matthewson*.

See ANSWER, 2.

MUNICIPAL CORPORATIONS.

1. Whether, under an act of the legislature authorizing the common council of a city to grant certain privileges as to the public streets, "under such reasonable regulations as they may prescribe," said council are authorized to pass a resolution granting such privileges, "upon such conditions as may be prescribed and approved by his Honor the Mayor, etc.," *quære*. *Noonan v. Grace*, 116.
2. In an action against the city of New York to recover damages for injury sustained by plaintiff in slipping upon snow and ice on the public street in a district much frequented and densely populated, where the evidence for plaintiff showed that for two weeks prior thereto, the sidewalk had been dangerous by reason of snow and ice thereon, and the testimony for defendant tended to overcome plaintiff's evidence, and showed that the sidewalk had not been dangerous till the afternoon of the day on which the plaintiff was injured, and that the snow, etc., was then put upon the sidewalk by boys to make a slide. It was *held*, that the verdict for plaintiff should not be set aside; that the jury could properly have been charged to determine whether, if ordinary observations or diligence had been used by the agents of the city, they would have had notice of the danger, which the city was bound to remove upon notice of it; and that as the charge is not set out in the appeal-book, it is to be presumed that the jury were properly charged. *Smul v. Mayor*, 126.
3. It was the duty of the city to use due diligence through its agents in observing whether the sidewalk remained in a safe state, and in as-

certaining that there was an appearance of its passing from a safe to an unsafe state; and the more apparent the danger, coupled with the apparent gravity of it, and the more frequented and densely populated is the place, the more likely should be the danger to meet the observation of the city's agents, soon after it occurs. *Ib.*

4. In an action to recover damages for injuries caused by the negligence of defendants, which injuries were occasioned by the falling of a tree growing on the sidewalk in a public street, and which after its fall was found to be rotten from its roots up, to a dangerous degree, the evidence being conflicting as to whether there was any exterior sign thereof while the tree was standing. *Held*, that the obligations of the city cannot be limited to the duty to act only upon exterior signs of danger, and it is a question for the jury whether or not the defendants should by some means anticipate the danger, even by cutting down the tree. *Vosper v. Mayor*, 296.
5. No cause of action accrues against a municipal corporation, from the mere fact that its officers have neglected their duty in the enforcement of its ordinances, *e. g.*, in regard to the condition of streets and highways. *Stillwell v. Mayor*, 360.
6. In an action for breach of an obligation on the part of a municipal corporation, involving knowledge of certain facts, its ordinances are competent evidence, when they show such knowledge or notice. *Ib.*
7. In an action for damages against the city for alleged negligence in permitting to remain upon the sidewalk an iron vault-cover, having a surface so smooth and slippery that it did not furnish a sure foot-hold for passengers: *Held*, that ordinances that all vault covers shall be placed within twelve inches of the area coping, or within twelve inches of the curbstone, and that all sidewalk

shall be raised from the curbstone two inches in ten feet, do not of themselves tend to show knowledge on the part of the city that if the provisions thereof are not observed, there will be danger to passengers of slipping on said vault-cover. *Ib.*

2. An ordinance directing the removal by certain city officials, of all vault-covers presenting a smooth surface, and the substitution therefor of covers presenting a rough surface and affording a secure foot-hold for pedestrians, etc., while it tends to show knowledge by the city that there was danger of slipping upon a smooth vault-cover, does not enlarge its legal obligations, and to recover for such cause it is necessary to prove neglect in failing to prevent the maintenance of such a cover. The duty of a municipal corporation as to sidewalks, etc., is to use ordinary care to furnish a reasonably safe place to step upon. *Ib.*

3. The evidence in this case considered and held insufficient to prove that the city was negligent in allowing the vault cover to be placed on the sidewalk or to remain there. *Ib.*

See CONTRACTS, 10 ; EVIDENCE, 9 ; OFFICERS.

MUTUAL BENEFIT ASSOCIATIONS.

The defendant corporation was a mutual benefit association having for its object provision for the families, etc., of deceased members, out of a fund accumulated for the purpose, the by-laws providing that each member might, by written notice, designate to whom the payment should be made on his decease. Plaintiff's son, a member, so designated plaintiff, and the board of management of defendant issued to him a certificate agreeing to pay to her said sum on the son's death. Thereafter, without plaintiff's knowledge, her son surrendered said certificate to defendant, and received

in place of it another certificate designating his wife as the person to whom such payment should be made, and soon after he died. *Held*, that defendant was not bound to pay to plaintiff, the mother, the sum mentioned in the certificate, and that the said certificate was not operative as a contract; and further, that the power to designate was not exhausted by one designation. *Deady v. Bank Clerks' Assn.*, 246.

NATIONAL BANKS.

See BANKS AND BANKING.

NEGLIGENCE.

1. Where it appeared that plaintiff and other customers of defendants had been in the habit, with defendants' permission, of using a certain door in their place of business for exit and entrance, which door was obviously intended for the transfer of freight, etc., and not for the use of customers,—in an action by plaintiff to recover damages for injuries caused by the falling of a hogshead through a hatchway above said door while plaintiff was entering the store, defendants are not entitled to have the jury charged that plaintiff, in entering by said door, took all risk of so doing. By giving such permission, defendants assumed a duty to plaintiff of protecting her from negligence. *Weinhold v. Acker*, 182.
2. The question whether permission was given by defendants so to use said door, is presented to the jury by evidence that prior to the happening of the accident, it had been used by plaintiff and others for exit and entrance. *Ib.*
3. Where, in such case, the evidence shows that immediately before entering said door, plaintiff was met by one of defendants' employees, who told her in a loud voice and with an excited manner and pushing her slightly, not to enter, de-

defendants are not entitled to a charge that, "if the jury believe that plaintiff was directed by an employee of defendants not to enter said door, and through heedlessness or inattention she did not hear what was said to her, or hearing it disregarded the warning, the defendants are not liable." First, because the request implies that it was enough if said person were an employee, though plaintiff were ignorant of the fact; and second, because plaintiff, in either event, is not, under the circumstances, chargeable as matter of law with want of due care. *Ib.*

4. Assuming the rule to be that the cases when a nonsuit will be sustained on the ground of contributory negligence are exceptional, and are confined to those where the undisputed facts show the omission or commission of some act, which the law adjudges negligence,—a case will be held within said exception, and a nonsuit proper, where it so appears that plaintiff was knocked down and injured by a street car while attempting to cross a street; that before starting she saw a car pass, did not look to see if another were approaching; and that the street was clear of obstructions to her vision, so that had she looked, she would before starting have seen the car by which she was injured, approaching. *Harnett v. Bleeker St. R. R. Co.*, 185.

5. Though it be taken as the rule that, on a motion for nonsuit, the most favorable view of the facts possible should be taken in behalf of plaintiff, yet in ascertaining what the facts are, if a fact is stated in a way most favorable to plaintiff by herself as a witness, and she afterward qualifies or contradicts the former testimony, she neutralizes in whole or in part that testimony, so that it cannot be considered as establishing the fact. *Per* SEDGWICK, Ch. J. *Ib.*

6. INGRAHAM, J., agreed that the nonsuit in this case should be sustained, holding that absence of contributory negligence is part of

plaintiff's case, and that there is here no evidence upon which a finding that plaintiff was not guilty of contributory negligence, could be upheld. *Ib.*

7. In an action to recover damages for injuries caused by defendant's negligence, it appeared that plaintiff, while descending a flight of steps leading from a station of defendants' elevated railroad, which at the time was very dark, felt carefully with her foot for every step, until within a few steps of the ground, when thinking she was at the bottom she stepped out and was precipitated with great force. The negligence complained of was the failure of defendant to keep said stairway lighted. *Held*, that it was a question for the jury whether or not plaintiff used ordinary prudence in believing, when she fell, that she was about to step from the last step, and that a verdict for plaintiff should be sustained. *Flagg v. Manhattan Ry. Co.*, 251.

8. Plaintiff, who was nearly blind, turned from the street upon which he was walking, supposing he had reached a certain house to which he intended to go, and went up steps belonging to defendants' warehouse, through a doorway, and fell into a hatchway close to the door. *Held*, that defendants, having a right to maintain said hatchway with the door, as a well known and ordinary business appliance, the burden of proof was on plaintiff to show negligence; that defendants were bound to use due care to protect from falling into the hatchway persons coming into that part of the building by their invitation, express or implied, but that the existence of such steps and doorway was not sufficient to establish an implied invitation, in the absence of evidence that the appearance of the door was like that used for the entrance of persons; also, that plaintiff's defective vision did not affect defendants' obligation in the premises. *Oysterbank v. Gardner*, 263.

9. *Further held*, upon consideration of the facts showing the relation of the hatchway to the street, that the case does not come within the rule permitting a recovery by a person who, proceeding on the highway with ordinary care, inadvertently steps from it into an excavation made by defendants so near the highway that such an occurrence might reasonably be expected. *Ib.*
10. On an action to recover damages suffered by plaintiff in falling down the well of an elevator provided by defendant for the use of his tenants, of whom plaintiff was one, it appeared that plaintiff walked from the street door towards the elevator, and saw that the elevator door was open, as he had often before seen it, and that the boy who ran it was seated beside the elevator; that it was so dark that plaintiff could not see the boy's face, though plaintiff saw he was in a nodding position; that plaintiff, supposing the platform to be there, stepped inside, and fell to the bottom. *Held*, that the question of plaintiff's negligence was properly left to the jury; that it was for them to decide whether or not the acts of the boy, defendant's agent, were not such as to throw defendant off his guard; that the plaintiff was bound to make only such effort to ascertain the condition of the elevator as would be made by ordinary prudence, or the ordinary use of the senses by a prudent man. *Dawson v. Sloan*, 304.
11. Plaintiff, while passing under the elevated railway of defendant, was injured by a cinder, falling from an engine thereon into his eye. The evidence showed that if the engine were in a perfect condition no fire could escape, also that cinders had frequently escaped before falling into plaintiff's eyes. No explanation of the occurrence was made by defendant,—*Held*, that a verdict for plaintiff should be sustained. *Searles v. Manh. El. R. R. Co.*, 425.
12. In an action against the City of New York to recover damages for injury sustained by plaintiff in slipping upon snow and ice on the public street in a district much frequented and densely populated, where the evidence for plaintiff showed that for two weeks prior thereto, the sidewalk had been dangerous by reason of snow and ice thereon and the testimony for defendant tended to overcome plaintiff's evidence, and showed that the sidewalk had not been dangerous till the afternoon of the day on which the plaintiff was injured, and that the snow, etc., was then put upon the sidewalk by boys to make a slide. It was *held*, that the verdict should not be set aside; that the jury could properly have been charged to determine whether, if ordinary observations or diligence had been used by the agents of the city, they would have had notice of the danger, which the city was bound to remove upon notice of it; and that as the charge is not set out in the appeal-book, it is to be presumed that the jury was properly charged. *Smid v. Mayor*, 126.
13. It was the duty of the city to use due diligence through its agents in observing whether the sidewalk remained in a safe state, and in ascertaining that there was an appearance of its passing from a safe to an unsafe state; and the more apparent the danger, coupled with the apparent gravity of it, and the more frequented and densely populated is the place, the more likely should be the danger to meet the observation of the city's agents, soon after it occurs. *Ib.*
14. In such a case, evidence that a passer-by, immediately after the happening of the accident in question, slipped and fell on the same spot, is admissible as tending to show the dangerous condition of the street. *Ib.*
15. In an action to recover damages for injuries caused by the negligence of defendants, which in-

juries were occasioned by the falling of a tree growing on the sidewalk in a public street, and which after its fall was found to be rotten from its roots up, to a dangerous degree, the evidence being conflicting as to whether there was any exterior sign thereof while the tree was standing. *Held*, that the obligations of the city cannot be limited to the duty to act only upon exterior signs of danger, and it is a question for the jury whether or not the defendants should by some means anticipate the danger, even by cutting down the tree. *Vosper v. Mayor*, 296.

Evidence that cinders had not fallen to so great an extent, since the time plaintiff was injured by one, when admissible. See Searles v. Manh. El. R. R. Co., 425.

Duty to public of railroad company occupying pier with elevated platform for cars, etc., without guards or lights; respective liabilities of railroad company and consignee, using pier for unloading cargo, for injuries to employee of consignee falling from such platform; contributory negligence of such employee. See Harden v. N. Y., Cent. &c. R. R. Co., 503.

See DAMAGES; MASTER AND SERVANT; STREETS AND HIGHWAYS.

NEW TRIAL.

Motion for, stating no ground, when raises no question on appeal. See McAleer v. Corning, 522.

See GENERAL TERM.

NEW YORK CITY.

Statements in "City Record," when evidence against the city. See Brandt v. Mayor, 507.

See CONTRACTS, 10; MUNICIPAL CORPORATIONS; OFFICERS.

NOTICE.

See BANKS AND BANKING, 11, 12.

OFFICERS.

1. The relator was the chief clerk in the Bureau of Inspection of Buildings of New York city, and his duty was, among other things, to receive applications for permits to alter buildings and generally to direct the operation of the bureau in its practical relation to the enforcement of the building laws, which said laws provide that no alterations be made in any building until a plan thereof shall be examined and approved by the Inspector of Buildings, nor until the building has been examined by the department to ascertain if it be in a good and safe condition to be altered. An application for permission to make a certain alteration having been duly filed with relator, he informed the applicant, the inspector being absent, that he might proceed with the work without the approval of the Inspector, whereupon the applicant proceeded therewith, and the next day the relator sent an examiner to the building, who reported against the application. *Held*, that relator's action was illegal and a sufficient ground for his removal from office; and this, though he acted by direction of the inspector, his superior; that it cannot be contended in relator's behalf, that what he said was unofficial; and that what he did, being intentional, was therefore wilful. *People ex rel. etc. v. Fire Comm.*, 369.

2. Any conduct of the relator's of a personal kind that was likely to result in a violation of the building laws was a neglect and violation of his official duty. *Ib.*

What bond not within prohibition of statute forbidding sheriff or other officer to take any bond, etc., by color of his office, except such as are provided by law. See Titus v. Fairchild, 211.

Power to delegate authority. See Gibson v. Nat'l Park Bk., 429.

See CORPORATIONS.

ORDINANCES AND BY-LAWS.

See CORPORATIONS, 7; MUNICIPAL CORPORATIONS.

PARDONS.

Contract by attorney to endeavor to procure, when not illegal. See Brem- sen v. Engler, 172.

PARTIES.

1. In an action against a member of a firm, the objection that the other partners are not joined as parties, will be deemed waived, if not taken advantage of by answer or demur- rer. *Wotherspoon v. Wotherspoon, 152.*
2. Action upon bond or undertaking given in an action is properly brought by party interested in his own name under § 814 Code. *Titus v. Fairchild, 211.*

See FORECLOSURE ; INSURANCE, 2; MARRIED WOMEN.

PARTITION.

Finding that parties were tenants in common, is sufficient finding that parties were in possession. See Zornlein v. Bram, 476.

PARTNERSHIP.

1. In 1867 plaintiff's testator was credited upon the books of W. & Co. upon the direction of the de- fendant W., who was a member of said firm, with the sum of \$10,000, and thereafter his account was reg- ularly kept on said books, and from time to time accounts current were rendered to him, showing the amount due him, including per- centage of profits, etc., each ac- count beginning with the balance carried forward from the preceding account, during which time several changes were made in the member- ship of said firm. In 1880, defend- ant, having associated with him other partners, and being the only member of the original firm remain- ing in the business of W. & Co., was

applied to for a statement of the ac- count of plaintiff's testator; and he rendered a statement entitled as an account of W. & Co. with plain- tiff's, testator, which carried for- ward the balance of the preceding account and which also contained charges for moneys purporting to have been paid by defendant indi- vidually for the use of plaintiff's testator. *Held*, in an action against defendant individually to recover the balance appearing on said ac- count which was alleged to have been received by him and wrong- fully detained from plaintiff's tes- tator—that the admission in the said account was the admission of defendant individually, that the amount therein named was in his hands. *Further held*, that such an admission must be taken by one seeking to recover on it in its en- tirety, and as it stands, allowing all debts and credits. *Wotherspoon v. Wotherspoon, 152.*

2. A. and W. entered into articles of copartnership, providing that the profits and losses should be divided forty-five per cent. to A. and fif- teen per cent. to W., thirty per cent. to be left undivided, and if no other disposition thereof were made, to be divided as above; also providing that said thirty per cent. "will be credited to A., and it is understood that where both parties of this contract agree, they may annually divide part or the whole of the profits." Some months there- after, W. wrote to G. a letter which was signed by A. in his own name, offering G. of the said "mercantile contract . . . between W. and myself, thirty per cent. of the pro- fits . . . of which I represent seventy-five per cent., you to an- swer . . . for any loss," etc. This proposal was accepted by G. in writing. *Held*, that the above facts show that by agreement be- tween both of the original partners, G. became entitled to thirty per cent. of the profits of the partner- ship business, and also liable for the losses, and therefore, became a partner in the firm., and not mere-

- ly a sharer of the profits of A. *Arguimbo v. Hillier*, 253.
3. Upon the death of one of several partners, the survivors alone are liable at law for the debts of the firm, and the liability of the representative of the deceased partner is in equity, and is that of a surety, to be enforced by the creditor upon showing either that the survivors are insolvent in fact, or that he has exhausted his remedy at law against them. *Fogarty v. Culler*, 397.
 4. Where the survivors form a new firm assuming the liabilities and taking the assets of the old firm, a specific agreement to accept the liability of the new firm to the exclusion of that of the representative of the deceased partner, must be proven by satisfactory evidence, and there is no presumption of law favoring it. *Ib.*
 5. That the creditor looked to the survivors for payment and accepted interest from them, and asked them to pay part of his debt, and did not press them for payment till fourteen months after the death of the deceased partner, raises no presumption that he has agreed to release the representative of said decedent from his secondary liability. *Ib.*
 6. In an action upon contract against partners, to justify an arrest of any defendant, it is necessary to prove that he actually and individually participated in the fraud which is alleged to be connected with the contracting of the liability. *Bacon v. Kendall*, 123.
 7. Where the fraud alleged is the purchase of goods when the firm was hopelessly insolvent, the concealment of said fact, and the intent not to pay for said merchandise,—each partner will be presumed to be acquainted with the accounts and affairs of the firm. *Ib.*
 8. That one of the partners was served with summons in an action against the firm on a business indebtedness of a large amount, and long overdue, is a fact which makes strongly against him on motion to vacate an order for his arrest. *Ib.*
- Assumption by new firm of liability of*

old firm, what sufficient evidence of.
See *Bate v. McDowell*, 106.

See PLEADING, 1, 2.

PATENTS

1. When a patent is apparently valid and in force, the party using it, receiving the benefit of its supposed validity, is liable for royalties agreed to be paid by him, and he cannot set up as a defense the actual invalidity of the patent under which he is manufacturing. If he intends to manufacture in hostility to the patent, he must give notice of such intention, in order that the presumption to the contrary may not attach or the patentee be misled. *Hyatt v. Ingalls*, 375.
2. Accordingly, where the agreement which contained various covenants for the benefit of the licensee, provided that the license should "continue for the full term of the patent and for any term of any extension, or renewal," and contained the licensee's acknowledgment of the validity of the patent, and his consent that the patentee might, "without prejudice to this agreement, hereafter re-issue, when and as often as she shall choose, the said patent of August 27, 1867, as re-issued August 6, 1878, and a re-issue of said patent was taken out in 1881, in good faith, but which, though substantially for the same invention, did not correspond with the patent nor the prior re-issue, in that it included additional matters not strictly patentable, because not contained in the prior specification, and the licensee continued to manufacture without giving notice that he was hostile to the patent. *Held*, in an action for royalties, that the state court had jurisdiction, that the licensee could not interpose the invalidity of said last re-issue as a defense; and that the words "as re-issued August 6, 1878," were words of description and not of limitation. *Ib.*
3. The patentee, in 1882, served upon the defendants a notice that the

license was revoked, and thereafter brought this action for royalties, and a rescission, in which a decree forfeiting the license, &c., was entered and accepted by plaintiff. *Held*, that while plaintiff was not by service of the notice, barred from an accounting under the contract, if defendant continued to manufacture thereafter, nor was the court deprived of its jurisdiction thereby; yet, the judgment as a whole must be founded on an affirmance or rescission of the contract, and plaintiff's election to take a decree of rescission entitled her to an accounting only to the date of the decree, and disentitled her to injunctive relief in the state court against future acts. *Ib.*

PERJURY.

1. Where on an examination of the sureties to an undertaking given on the arrest of defendant, it appears that such sureties were entirely irresponsible, and knew themselves to be so at the time they justified, they will be held guilty of a contempt of court. *Egan v. Lynch*, 454.
2. Though they may thereafter be indicted for perjury, the court has power to attack and summarily punish them for their offense against its dignity, by imposing a fine sufficient to indemnify plaintiff for the loss he has suffered, and by imprisonment for six months and until the fine is paid. *Ib.*
3. If they are indicted for perjury, the court trying the indictment will in passing sentence, take into account the previous punishment. *Ib.*
4. Such a commitment is not in violation of Art. I, § 2 of the State Constitution, nor of Art. V. Amendments U. S. Constitution. *Ib.*

PLEADING.

1. Where the complaint in action against partners for goods sold the firm, alleges a general partnership only, and seeks recovery against defendants as members thereof, and

the answer of one of the defendants sets up a limited partnership, as to him, by way of avoidance, plaintiff on the trial may show the falsity of the statutory certificate as to payment of capital, etc., for the purpose of charging said defendant as a general partner. *Sharp v. Hutchinson*, 50.

2. Whether, if defendant had not pleaded the limited partnership such evidence would have been admissible, *quære. Ib.*
3. In an action to recover damages for inducing plaintiff to part with his money by false and fraudulent representations, the complaint alleged that defendant stated to plaintiff that he (defendant) was "the sole owner of the stock of a certain corporation which company owned and held the title to about thirty-three acres of land situated at Appalachicola, Franklin county, Florida, having thereon a large and valuable saw-mill water front wharves, all of which he represented to be of great value and a rare investment." The complaint further stated that defendant "pretended to point out to plaintiff the metes and bounds of said lands," and "further pointed out that the company's land included, etc." Defendant's ownership of the stock was fully proven by his affidavits. Upon a motion to vacate an order of arrest,—*Held*, that the clause "which company owned, etc.," and those which follow, are to be deemed descriptions of the property made by the pleader, and not allegations of statements made by defendant to plaintiff; that the allegation "all of which he represented to be of great value, etc.," concerns a matter of opinion not of fact; that the word pretended to point out," and "pointed out," are not the equivalent of said or represented; and that, as the above were the false representations relied on, and as they were not stated in the complaint with definiteness and certainty sufficient to constitute such a cause of action, the order of arrest must there-

- fore be vacated. *Schicenk v. Naylor*, 98.
4. In an action to recover the possession of personal property alleged to have been obtained upon credit by means of false representations, where the complaint shows that plaintiffs sold and delivered the goods to defendant, and that in consequence of the fraud therein duly alleged, they seek to avoid the contract of sale, the complaint will be held on demurrer to sufficiently allege a special property in the goods and a right to their possession, under § 1720, Code Civ. Pro. *Morrison v. Lewis*, 178.
 5. In such case, it seems, also, that the ownership of the property should be implied from the allegation of sale and delivery. *Ib.*
 6. It is sufficient in such an action that the allegation that the false representations were made with intent to deceive and defraud plaintiff, can be fairly gathered from all the averments of the complaint. Accordingly, where the false representations were alleged to have been made to a commercial agency with intent "to obtain credit and to induce merchants and others to sell goods to them," when defendants knew the statements were false and untrue, etc.,—*Held*, sufficient. *Ib.*
 7. A denial in the following form is insufficient to raise an issue: "defendant denies each and every allegation in said complaint contained, not hereinbefore specifically admitted or denied." *Luce v. Alexander*, 202.
 8. The defendant's right to amend his answer as of course, is not waived by his service thereafter of notice of trial. Under section 542 of the Code of Civil Procedure, the plaintiff has no right to demand that such an answer be stricken out, unless it appears that it was amended for purpose of delay. *Duyckinck v. N. Y. El. R. R. Co.*, 244.
 9. It is not the intention of the Code to permit judgment for fraud in an action under subdivision 4 of section 549, upon the general allegation that there was fraud; and where the complaint, after duly setting forth a cause of action on contract, states "that the defendant was guilty of fraud in contracting and incurring liability, in that, etc., and there are no averments of facts which constitute fraud, such complaint should be dismissed on the trial, upon the ground that it does not state facts sufficient to constitute a cause of action. *Lawrence v. Forrell*, 273.
 10. A complaint which states that at the time of the purchase of the goods by defendant, and to induce plaintiffs to sell them to him on credit, he stated that he had sold the same to another, etc.; that relying upon this, plaintiffs made the sale; and that said goods had not been sold by defendant, etc., does not state a good cause of action for fraud, there being no allegation that the representations were fraudulently made, or with knowledge that they were not true, or with intent to defraud. *Ib.*
 11. In an action for the wrongful conversion and sale of personal property of plaintiff's, where the answer is a general denial, defendant may prove as a defense, the execution of a bill of sale of said property to him by plaintiff, and of an instrument by him agreeing that said bill of sale shall be void on payment of rent, etc., and a sale by him thereunder. *Schoenrock v. Farley*, 302.
 12. The said instruments make a mortgage and not a pledge, and the defense thereunder denies plaintiff's title, and does not constitute matter of justification. *Ib.*
 13. Where the sufficiency of a proposed supplemental answer setting up newly discovered facts, is a matter of doubt, the court will not prejudice the validity of the defense on a motion, but will permit the defense to be set up if defendant be free from laches. *Tift v. Bloomberg*, 323.
- Duplication of cause of action in eject-*

ment by stating two sources of title; when not objectionable; indefiniteness and redundancy, rule as to. See Rank v. Grote, 502.

Statements as to indebtedness and as to "succession" to partnership claim; when deemed conclusions and not facts. See Bailey v. Richmond, 519.

Rules of construction; action by client against attorney for alleged breach of duty resulting in imprisonment of client. See Mulone v. Sherman, 530.

See ANSWER.

PLEDGE.

One who has received personal property as pledgee has no right to set up the claim of a third person as against his pledgor. Accordingly, where plaintiff, upon the death of his son intestate, assigned to defendant as security for moneys loaned plaintiff, his interest as next of kin in certain shares of stock owned by said intestate, and the certificates of said stock were delivered to and received by defendant as such security, he being at the time president of the corporation which had issued them, and thereafter upon plaintiff's appointment as administrator of his said son, he tendered to defendant the amount of said loan to defendant and demanded the return of said certificates, which was refused by defendant upon the ground that the company had a claim against said intestate. *Held*, that an action for conversion would lie. *Godfrey v. Pell, 226.*

What constitutes. See Schoenrock v. Farley, 302.

POOR PERSON.

1. It is inconsistent with the letter and spirit of the Code to permit one to sue as a poor person who has parted with an interest in the claim upon which the action is brought, though the assignment thereof be to her attorney as com-

pensation for his services. *Joyce v. Cooper, 115.*

2. The order permitting a person to sue must contain a provision assigning to the petitioner an attorney who must act without compensation. Such an order is within the discretion of the court. *Ib.*

PRACTICE.

See ARREST; ATTACHMENT; DEFAULT; EXAMINATION BEFORE TRIAL; GENERAL TERM; GUARANTY COMPANIES; GUARDIANS; INSPECTION OF WRITINGS; INTERPLEADER; JUDGMENT; MOTIONS AND ORDERS; AMENDMENTS; POOR PERSON; RECEIVER; REFERENCE; SECURITY FOR COSTS; SPECIAL ISSUES; STIPULATIONS; SUPPLEMENTARY PROCEEDINGS.

PRESUMPTIONS.

When each partner presumed to be acquainted with firm books and accounts. See Bacon v. Kendall, 123.

Presumption under statute in regard to assignments to hinder, etc., creditor. See Hayes v. Reilly, 334.

Insolvency of National Bank, presumption as to. See Raynor v. Pac. Nat. Bank, 119.

Against broker who refuses to disclose particulars of sale by him. See Bates v. McDowell, 106.

Presumption from corporate seal and name, as to execution of instrument; also from recital of receipt of consideration. See Seeley v. Morgan, 346.

PRIVILEGE.

See EXAMINATION BEFORE TRIAL.

PUBLIC POLICY.

Contract by attorney to try to procure pardon, when not illegal. See Bremsen v. Engler, 172.

See TELEGRAPH COMPANIES.

RAILROADS.

1. Irrespective of the regulations of the company, the conductor of a street railroad car has a right and a duty, within the scope of his authority, to put off a passenger, even after his fare is paid, if he becomes disorderly or offensive. *Flynn v. Central Park, etc. R. R. Co.*, 81.
2. Though the act of an employee be flagrant, reckless and illegal, still if it is within the scope of his authority and employment, and his authority is not used merely for an independant and wrongful purpose of his own, the employer is liable therefor. *Ib.*

Bonds of railroad companies are negotiable instruments. See Northampton Bank v. Kilder, 338.

Liability to public of railroad company using pier with elevated platform for cars without guards or lights; respective liabilities of company and consignee using pier for unloading freight. See Harden v. N. Y. Cent. &c., R. R. Co., 503.

See NEGLIGENCE.

REAL PROPERTY.

1. When the devisee of real property aliens the same before her death, her personal representative is liable, in a proper case, under Art. 2, tit. 3, ch. 8, part 3, R. S., for the debts of her devisor to the same extent that said devisee was in her lifetime. *Traud v. Magnes*, 309.
2. Under said statute, real property which has been devised, and has descended on the death of the devisee to her heirs, may be subjected to the payment of the devisor's debts in like manner as before the death of said devisee.

See ADVERSE POSSESSION; TITLE; TRUSTS.

RECEIVERS.

1. A cause of action against a corporation for a breach of contract

accruing prior to the appointment of a receiver *pendente lite*, in an action to dissolve said corporation, cannot be enforced against the receiver until the corporation is adjudged dissolved, and the order permitting such a receiver so to be sued is not an adjudication as to his liability. *Fleischauer v. Dittenhoefer*, 311.

2. A bond given in pursuance of an order or decree by a receiver to the clerk of the court, conditioned for the faithful performance of the receiver's duty, does not fall within the prohibition of the statute forbidding a sheriff or other officer to take any bond, obligation or security by color of his office, except such as are provided by law. *Titus v. Fairchild*, 211.
3. Where the penal sum in a receiver's bond is payable to "J. M. S., clerk of the Superior Court, etc.," without any words showing that the obligee's representatives are to succeed to his rights, and which shows on its face that it is given in pursuance of orders of the court, to secure the faithful performance of the receiver's duty, etc., said bond will not be construed to be an obligation to said J. M. S. individually, but will be held valid for the purpose for which it is given. *Ib.*
4. An action on such a bond is properly brought by the party interested, in his own name, after leave of court by order, under § 814, Code Civ. Pro. *Ib.*
5. The recitals in such a bond are *prima facie* evidence of the facts therein set forth, in an action thereon. *Ib.*
6. Where such a bond is conditioned that the receiver shall faithfully execute his trust and make payments as directed by order of the court, it is sufficient to sustain an action for breach thereof, against the sureties, to show orders granted upon notice to the receiver, and after he had been heard, directing him to pay a certain sum to plaintiff, and adjudging him in con-

tempt for failure to do so, and plaintiff need not prove that there are sufficient funds of the estate in the receiver's hands to meet his claim. *Ib.*

REFERENCE.

1. At any stage of an equity case to be tried by the court without a jury, when it becomes manifest that a reference will serve the ends of justice, the court will order one. *Rutty v. Persons*, 55.
2. In an action to recover moneys alleged to have been deposited with defendants as bankers, where the answer states that such deposit was made with defendant as brokers, for margin with which to speculate for plaintiff, and sets out a long account showing a counterclaim for losses arising therefrom, the court has power to order a reference, though on the motion therefor, it appears that plaintiff's liability upon the account depends upon the question of her husband's authority to act as her agent. *Day v. Jameson*, 373.
3. It is within the discretion of the court in such case, to deny the motion where the plaintiff offers a stipulation that if such agency be proved, the account will not be disputed; but where it appears that such agency may be proved as to part only of the transactions covered by the account, the general term will modify the denial by providing that it shall be without prejudice to a motion for reference before the trial judge in a proper case. *Ib.*
4. Where the order in such a case does not state that the motion was denied on the ground of lack of authority, the defendant will be charged with costs of appeal. *Ib.*
5. Upon an application to re-open a judgment, after trial upon the merits, before a referee, appointed to try the whole issues, an order cannot be made directing the referee to take certain testimony concerning the issues and report with his opinion to the court the judgment meanwhile to stand as

security, etc. A judgment on a referee's report cannot be so reviewed. *Melville v. Matthewson*, 388.

REPLEVIN.

See PLEADING, 4-6.

RES ADJUDICATA.

1. Where one purchases merchandise of another, and his vendor sues him for goods sold and delivered, to which action he sets up as a defense that he purchased as broker of a third party, disclosing his principal at the time, and judgment goes against him; the third party having no notice of this action, is not privy to it, and the judgment does not establish as *res adjudicata*, or tend to establish as evidence, either that the purchase was made for him, or that vendee disclosed or did not disclose him as the principal. *Knapp v. Simon*, 17.

See RECEIVER, 1.

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See PATENTS.

SALE.

1. Where the owner of certain chattels leases the same at a certain rent, the agreement providing that in case of non-payment at the times

specified, the right of possession shall thereupon revert in the party of the first part, the owner, and also providing that if within a certain time a specified sum is paid, the chattels shall become the property of the party of the second part—the party of the first part still remains the general owner of the property, and may recover damages for a conversion thereof by a third party, though the right of possession be in the party of the second part. *Bohde v. Farley*, 42.

2. The mere receipt by the lessor of a part of an installment of rent after the same falls due, is not a waiver of his right to take possession; nor is a naked promise to "not to ask further payments" for a certain time, a waiver of the right to take possession under default theretofore made. *Ib.*
3. Where the vendor in an executory contract for the sale and delivery of merchandise, upon the vendee's refusal to accept the same, elects to sell for the vendee's benefit, the only requisite to such a sale, as the measure of the rights and injury of the vendee, is good faith, including a proper observance of the usages of the particular trade. *Austin v. Hartwig*, 256.
4. The presence of the vendee at the sale, not objecting, is sufficient evidence of its regularity, in an action by the vendor to recover the balance of the contract price. *Ib.*
5. In such an action, the vendee will not be deemed harmed by the mere fact that the vendor bought in the merchandise, by bidding above others present at the sale. *Ib.*

See CONTRACT; FALSE REPRESENTATIONS.

SECURITY FOR COSTS.

1. The defendant is entitled, under § 3268, *Code Civ. Pro.*, to demand security for costs in an action by an infant plaintiff, though such action was begun before the passage of said Code; viz., in December, 1877. *Schultz v. 3d Ave. R. R. Co.*, 95.

2. Subdivisions 4 and 13 of § 3347, *Code Civ. Pro.* are not to be construed as limiting § 3268 to actions begun before September 1, 1877. An inspection of the whole of said section shows that its discriminations do not turn alone upon the time of the commencement of the actions. *Ib.*

SHERIFF.

Authority to do acts merely ministerial or mechanical may be delegated; and, accordingly, the sheriff may delegate to an assistant the power to certify a copy of a warrant of attachment, and make a notice thereof, as required by the Code of Civil Procedure. *Gibson v. Nat. Park Bank*, 429.

SPECIAL ISSUES.

1. An order requiring that the special issues be framed and tried by jury, will be reversed on appeal where it appears that the motion was noticed before the plaintiff's time to reply or demur to the counter-claim set up in the answer had expired. *Rutty v. Persons*, 55.
2. Though the granting of such a motion in a proper case is in the discretion of the court, yet where it appears that the issues as framed are so minute and numerous, and so grouped that confusion and mistake by a jury may be expected, the appellate court will reverse the order. *Ib.*

SPECIAL PROCEEDINGS.

Costs in discretion of the court. See *Matter of Dunham*, 487.

SPECIFIC PERFORMANCE.

1. The aid of the court to enforce specific performance of a contract is not a matter of right, but rests always within the judicial discretion of the court, guided by the rules of equity as applied to the circumstances of each particular case, and it will not be granted

when it will produce hardship or injustice to either of the parties.

Cameron Coal Co. v. Emanuel, 77.

2. In an equitable action of such a nature the court should receive all parol evidence which may be offered to show mistake or fraud, whereby the written contract fails to express the actual agreement, and to prove the modifications necessary to be made therein, either as limiting the scope of the instrument or enlarging it. *Ib.*

3. Accordingly, where defendant as executor, owned bonds of a certain company, and together with other bondholders, agreed in writing for a consideration, to surrender the same and receive in return stock of a new company to be formed under a scheme of re-organization, said bonds being then and at the time of bringing this suit, held by a third person as security for a claim against defendant's intestate, the amount of which claim was disputed by defendant and was in issue between the parties, and defendant having demanded the return of said bonds, which was refused, etc.,—of all which facts as appear from letters and conversations in evidence, plaintiff (the company) was aware, and it was understood orally between plaintiff and defendant at the time of the execution of the instrument, that present delivery was waived till defendant should obtain possession of the bond, and that the execution of the contract by defendant was conditional,—*Held*, that specific performance should not be decreed. *Ib.*

STATUTE OF FRAUDS.

Where one of two creditors of a certain firm holding the notes of said for its indebtedness, at the request of the other creditor, and to enable the latter to collect his claim, promises before the same are payable, to delay proceeding on said notes till a certain time after their maturity, in consideration of which the other creditor agrees to pay

said notes at the date named; such agreement to pay said notes is an original undertaking and not within the statute of frauds, and is therefore enforceable, though not in writing. *White v. Rintoul*, 421.

STATUTE OF LIMITATIONS.

1. No indebtedness arises by reason of a certificate of deposit, nor does the statute of limitations begin to run until a demand for the return of the amount has been made. *Smiley v. Fry*, 134.
2. An action on said certificate against the personal representatives of a deceased member of said firm and the surviving partner, in which the surviving partner is not served and does not appear, is not a demand as against him. *Ib.*
3. It seems that the rendition of a statement of account by the depositor to said firm in which the claim on said certificate is included under the head of "accepted charges," is not sufficient evidence of a demand to set the statute running. *Ib.*

Distinctions in its operation on residents and on non-residents; absences from the State, etc. See *Ullner v. Butterfield*, 515.

Right of foreign corporation to take advantage of, in action against it for causing death. See *Londriggan v. N. Y., etc. R. R. Co.*, 526.

STIPULATIONS.

1. The court at special term has general power to relieve, in a proper case a client from stipulations entered into by his attorney, *e. g.*, a stipulation that the verdict of a jury, or order or direction of the court, in a certain other action between the same parties, shall be deemed to have been made in the action in which the stipulation is entered into—or, that in case of a default in a certain other action between the same parties is not opened, judgment shall be entered

in the action in which the stipulation is made against the party stipulating. *Metr. Concert Garden Co. v. Abbey*, 294.

2. Whether an attorney can so bind his clients without express authority, *quære. Ib.*

STOCK.

See CORPORATIONS.

STOCKBROKERS.

See BROKERS.

STOCK EXCHANGE.

1. Defendant held in his own name, as part of the assets of a firm of which he was a member, a seat in the New York Stock Exchange, a voluntary unincorporated association, which seat was, by the by-laws, unassignable without the consent of two-thirds of the committee on admissions of said association, it being also provided therein that all unpaid duties of membership and claims of other members should be a lien on said seat. Said firm made an assignment in bankruptcy of all its assets, and the defendant continued thereafter to hold and use said seat for his own benefit. The assignee, after demanding the said seat of defendant, which was refused, brought this action to enjoin him from using or interfering with it, and to compel defendant to do all such acts, and execute all such instruments as might be specified by plaintiff, to the end that said seat might be disposed of, and the proceeds applied to the trust, etc. The association was not made a party to the action, and it did not appear that plaintiff had made any contract of sale with a third party, and that defendant or the Stock Exchange had refused to perform any acts necessary to transfer or confirm the title to said seat; nor was it claimed that, except as above, defendant had been guilty of any interference with plaintiff's rights. *Held*, that no equitable cause of action was shown; that

defendant had done nothing which impaired the property rights of plaintiff or prevented him from disposing of whatever rights he had; that no one could become a transferee of said seat under these existing circumstances; and the Stock Exchange not being a party, it will not be assumed that it will refuse its assent to a transfer for the benefit of the assigned estate in a proper case. *Platt v. Jones*, 279.

2. *Further held*, that the right of membership in said association was incorporeal, and the fact that defendant continued to use it did not affect the value of the property claimed by plaintiff, or prevent him from receiving any profits to which he was entitled; also, that there was no possibility that the non-payment of dues or any other lien caused by defendant could affect plaintiff's rights. *Ib.*
3. The complaint alleged that plaintiff was expelled from the New York Stock Exchange and deprived of his valuable rights as a member thereof, without any violation on his part of the rules of the association. The answer alleged that the said Stock Exchange is a voluntary unincorporated association, having a constitution, etc., to which plaintiff pledged himself on becoming a member, and which provides that any member guilty of "obvious fraud," of which the governing committee shall be the judge, shall, on conviction, be expelled, and his seat escheat to said exchange. *Held*, not a case in which defendant was entitled to a bill of particulars of the fraud alleged. *Solomon v. McKay*, 138.

STREETS AND HIGHWAYS.

1. Whenever a natural person or a corporation is authorized by way of duty or privilege, to disturb the surface or bed of a highway, in the exercise of the right, due diligence must be used to prevent accidents to way-farers. *Flynn v. N. Y. El. R. R. Co.*, 60.

2. This obligation is independent of the obligation to do the work skillfully, and is not lessened by the fact that the right to interfere with the highway is exercised by means of a contract with other persons. The duty is imperative, so long as the interference with the highway exists, and no notice thereof is necessary to charge the party exercising such right. *Ib.*

See EVIDENCE, 4; NEGLIGENCE, 9.

SUPERSTITIOUS USES.

See TRUSTS, 2, 3.

SUPPLEMENTARY PROCEEDINGS.

An affidavit for an order in supplementary proceedings for the examination of a judgment debtor, which, in addition to the usual allegations, states "that the defendant hath been, at divers times heretofore, examined under orders supplementary, previously granted, and no property discovered, but that since the last examination the defendant hath become possessed of certain personal property,"—while it states enough to give jurisdiction to the judge to whom the application is made, does not show sufficient reason for the granting of the order for further examination. *Rallings v. Pitman*, 307.

SURETIES.

Perjury by sureties in their justification is contempt of court. *Egan v. Lynch*, 454.

See BONDS; GUARANTY COMPANIES; PARTNERSHIP, 3-5.

TELEGRAPH COMPANIES.

1. Upon a motion by a stockholder of the Western Union Telegraph Co., to continue a preliminary injunction against the consummation of an agreement for the acquirement by lease of all the property, lines, etc., of the Mutual Union

Telegraph Co., it appeared that prior to the service of the temporary injunction, the transaction had been consummated excepting only the payment of the consideration by the Western Union Co., *Held*, that as such a transaction between telegraph companies is authorized by Laws 1870, ch. 568, it cannot be enjoyed as tending to create a monopoly and contrary to public policy. *Reiff v. West. Un. Tel. Co.*, 441.

2. Said lease was intended to cover the property of the lessors in different states, but contained a clause that it should not be construed to pass title to property in any state where such transaction would be illegal and made provision for adjustment of consideration in such case. It appeared that the consolidation of telegraph companies was illegal in the state of Pennsylvania where certain of the property of said Mutual Union Co., was situate. *Held*, no ground for an injunction; that it is doubtful whether the constitution and laws of a state can be enforced against companies formed under the laws of another state and having the power to consolidate at home; that whether or not the provision in the lease intended to meet the above objection is sufficient, the objection is of no force here, for a partial failure of consideration contemplating by the contracting parties, and with reference to which the bargain was closed, does not justify a court to interfere. *Ib.*

3. Defendant further objected that the consolidation of the Western Union Co., with the Atlantic & Pacific Co., and the American Union Co., and the increase of stock to pay therefor, and for distribution among the stockholders of the former company, had been adjudged illegal. *Held*, that the decisions made, went only so far as to pronounce illegal the scheme involved in that consolidation, of gratuitously distributing among the stockholders about 15 millions of increased stock, which rendered

that particular agreement null and void. *Ib.*

4. It was also objected that the stock and bonds of the Mutual Union Co. referred to in the lease were illegal. *Held*, immaterial, if true, since they merely furnish the measure for the agreed rental; that it can make no difference to the Western Union Co. or its stockholders whether the rental is paid to the Mutual Union Co. or its stockholders; that as to the bonds the Western Union Co. are estopped from disputing their validity.
5. *Further, held*, as to all of the above objections, that they fail to show want of power and involve only matters of discretion affecting price and questions of policy, and courts cannot dictate the business policy to be pursued by a corporation, though such discretion may be unwisely, imprudently or even recklessly exercised by it.
6. Laws 1870, ch. 568, provides that no purchase, sale, lease or conveyance by any telegraph company, under said act, "shall be valid, until it shall have been ratified and approved by a three-fifth vote of its board of directors or trustees, and also by the consent thereto in writing, or by vote, at a general meeting duly called for the purpose, of the three-fifths in interest of the stockholders in such company, present or represented by a proxy at such meeting." The scheme in question was duly ratified and approved by three-fifths of the board of directors of the Western Union Co., and three-fifths in interest of the stockholders consented thereto in writing. *Held*, not a sufficient compliance with the statute, inasmuch a such consent of the stockholders was not given at a general meeting called for the purpose. *Ib.*
7. *Accordingly held*, that plaintiff was entitled to an injunction against the consummation of the lease in question during the pendency of the action, with leave to the Western Union Co., to convene a general

meeting of the stockholders for the purpose of procuring the proper statutory ratification thereof. *Ib.*

8. The principles of the law of corporations and of statutory construction stated and applied by the court. *Ib.*

TENDER.

See USURY.

TITLE.

Where the vendor in an executory contract for the sale of lands, agrees to convey certain real estate, viz.: "a tanyard property, . . . subject to a mortgage of \$3,500," the vendee is justified in refusing to take said premises, subject also to easements, *e. g.*, a right to certain water-power, also to keep up a dam, and to the use of a spring. *Wheeler v. Tracy*, 208.

Title to personal property, how pleaded in replevin. See *Morrison v. Lewis*, 178.

See ADVERSE POSSESSION.

TORTS.

See EXECUTION; MARRIED WOMEN.

TRIAL.

1. A judgment against plaintiff on a cause of action not contained in the complaint will not be reversed, on the ground that said cause of action has been conclusively made, or that the evidence was sufficient to carry the cause to the jury for its determination on that cause of action, where the evidence tending to support such cause of action, was received without objection, but was competent on the issues joined, and plaintiff's counsel did not request the trial justice to charge the jury as to the obligations of the defendant under such cause of action. *Knapp v. Simon*, 17.
2. It is error to permit counsel, against objection, to read, during his summing up, extracts from a book of reports of law cases. But

where it is clear that the opposite party was in no way injured, *e. g.*, where none of the facts of the case cited were given by the counsel to the jury, and the matter read contained only the principles of law which the court thereafter properly charged, such error will not be fatal. *Vosper v. Mayor*, 296.

See JUDGE'S CHARGE.

TRUSTS AND TRUSTEES.

1. Y. being indebted to R. conveyed to him certain real property as security, and thereafter R. conveyed said property to a third person, receiving as consideration, a mortgage thereon, which he retained in payment of his claim, and a deed of certain other premises, which, at the request of Y., was allowed to go to Y.'s wife, who thereafter exchanged the same for other real property which she sold for \$155. With this money, and \$200 of her own, she purchased premises which she subsequently sold at an advance of \$5,000 on the purchase price, and with \$5,500 of the amount so received, purchased certain other premises. Plaintiff holding a judgment against Y. for \$494.76, founded on a claim existing at the time of the above occurrences, upon which an execution had been returned unsatisfied, brought this action against Y. and his wife, to have his judgment satisfied out of said property last referred to, etc. The trial judge found that the wife paid no consideration for the property originally conveyed to her, and that she knew of Y.'s indebtedness to plaintiff, and held the property to place it beyond the reach of Y.'s creditors. *Held*, that the conveyances to and from the wife were void as to Y.'s creditors, and that said wife took and held and subsequently dealt with the premises originally conveyed to her, as trustee, subject to a resulting trust, under the statute, in favor of said creditors; and further that plaintiff was entitled to an accounting regarding the rents, etc.,

of the several parcels of land so held by said wife, and to judgment appointing a receiver and directing a conveyance to and a sale by such receiver of said premises, held by the wife at the time of the commencement of the action, and that plaintiff's said judgment be paid from the proceeds, in full, and not merely to the extent of said \$155. *Popfinger v. Yutte*, 312.

2. Where G., a married woman, placed into the hands of the defendant, an undertaker, a certain sum of money with the direction and upon the condition that the same should be used by the defendant, in the first instance, for the purpose of defraying the expenses of her funeral and of that of her husband and of the erection of a suitable monument to their memories, and, in the second place, to have masses said by a Roman Catholic priest for the repose of their souls; and Mrs. G. thereupon died intestate and without issue; and subsequently the husband died intestate and without having taken out letters of administration upon her estate or having reduced the money to possession; and thereafter the plaintiff, as administrator of the estate of the husband, brought an action to compel the defendant to account, that the disposition made by Mrs. G. of her money, even if otherwise effectual, would, in so far as it relates to the saying of masses, be void according to the law of England as made for a superstitious use, but that this doctrine cannot prevail in the courts of the United States or of the several states thereof because it is contrary to the spirit of the constitutional provisions prohibiting discrimination on religious grounds. *Gilman v. McArdle*, 463.
3. That the disposition of the money constituted neither a gift *inter vivos* nor a gift *causa mortis*, because there was no intention of parting with the title. *Ib.*
4. That, though Mrs. G. may have sought to create a trust for the uses specified, and though a trust

relating solely to personal property may be created by parol, the disposition made of the money was not a trust which the law can recognize because no title passed, and, because, after the deaths of Mr. and Mrs. G., there was no longer any person in existence or capable of coming into existence who as beneficiary could call the trustee to account if the latter should refuse to execute the trust. The souls of Mr. and Mrs. G. cannot in law or equity be treated as beneficiaries. *Ib.*

5. That, no title having passed by either a bequest or gift or legal trust, the disposition of the money amounted to a naked deposit into the hands of an agent with certain instructions. In such a case it is a fundamental principle of the law of this state that the principal may at any time revoke the instructions and recover his property, and that if he does not do so in his lifetime and dies intestate, his death revokes the authority of the agent, and that as the title must go somewhere, it goes to the administrator of the intestate. *Ib.*
6. That the plaintiff, the administrator of Mrs. G.'s husband, is entitled to judgment directing the defendant to account and pay over; but upon the accounting the defendant is entitled to protection for all acts done by him in good faith pursuant to the instructions received from Mrs. G. up to the time the plaintiff demand the money. *Ib.*

U. S. REVISED STATUTES.

U. S. R. S. §§ 5226, 5227-5234, 5242, 5244 121.

UNDERTAKING.

It seems that failure to require from plaintiff undertaking an arrest in at least one-tenth of bail demanded in the order of arrest, is ground for vacatur of order. See Godfrey v. Pell, 206.

That assignment of judgment carries

rights under undertakings in the action. See Newberg v. Schwab, 232.

Perjury in justification of sureties, is contempt of court. See Egan v. Lynch, 454.

Undertaking on arrest cannot be cancelled on motion on ground that complaint has been dismissed—Code. Civ. Proc. § 600. See Lawrence v. Foxwell, 506.

See BONDS; GUARANTY COMPANIES.

USURY.

1. Where one who holds a mortgage as assignee of the mortgagee, brings an action for the foreclosure of the same, and the proof shows that the loan secured by it was in fact made by said assignee; that the mortgagee was only a cover, and that the assignee did not rely upon the mortgagor's affidavit, etc., against defenses, the latter is not thereby estopped from pleading the defense of usury. *Breunich v. Weselmann, 81.*
2. Where the proof in an action of foreclosure clearly shows that the mortgage was usurious, a plea of tender of a certain amount in the answer cannot be held to constitute a conclusive admission that such an amount is due, the answer also setting up the usury as a defense. *Ib.*

VERDICT.

When may be corrected. See Chamberlain v. Brady, 484.

WAIVER.

Irregularity in judge granting arrest without demanding undertaking in at least one-tenth bail required by order—how waived by defendant. See Godfrey v. Pell, 206.

Delivery at time specified in contract, how waived. See Phillips v. Taylor, 318.

Objection to jurisdiction over foreign corporation, not waived by neglect to take it in answer. See Brooks v. Mex. Constr. Co., 234.

Objection to rejection of evidence, when

waived by examination on same point.
See *Bate v. McDowell*, 106.

Rights of priority of attachment creditors, how waived by taking part in proceedings under assignment for creditors. See *Hubbell v. Bowa*, 131.

Of right to amend answer. See *Duyckinck v. N. Y. El. R. R. Co.*, 244.

What not waiver of vendor's right to take possession of personal property for breach of contract of conditional sale. See *Bohde v. Farley*, 42.

Statement in sworn proof claim in bankruptcy that claim is not secured, is waiver of the security, e. g., a deed—only as to so much of indebtedness as is mentioned in claim. See *Lockwood v. House*, 500.

See APPEAL.

WARRANTY.

That leased premises are habitable,

when not warranty that they will continue so. See *Fowler v. Stevens*, 479.

WILLS.

Rights of children born after will is executed, no provision being made for them; conveyance by sole legatee and devisee in fraud of rights of said children, when will be set aside; mutual wills, what necessary to constitute. See *Drischler v. Van Den Henden*, 508.

WITNESS.

When jury not bound to believe testimony of plaintiff as to bona fides of assignment attacked by defense as being in fraud of creditor, on ground that plaintiff is interested party. See *Hayes v. Reilly*, 334.

Privilege of party examined before trial. See *Canada Shipping Co. v. Sinclair*, 242.

Ex. G. U. 12.



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